78-873

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK, IRVING ANKER, Chancellor of the City School District of the City of New York,

Petitioners,

-against-

JOSEPH CALIFANO, Secretary, United States Department of Health, Education and Welfare, HERMAN R. GOLDBERG, Associate Commissioner, Equal Educational Opportunity Programs, United States Department of Health, Education and Welfare,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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The Opinion Below

The opinion delivered by the Court of Appeals for the Second Circuit upon the rendering of the decree sought to be reviewed has not been officially reported. It is attached hereto as Appendix I.

Jurisdiction

The decree sought to be reviewed was dated and entered on August 21, 1978.

By orders dated October 6, 1978 (attached hereto as Appendix II), petitioners' petition for a rehearing with a suggestion for a rehearing en banc was denied by the Court of Appeals.

This Court has jurisdiction to review the decree in question by writ of certiorari pursuant to 28 U.S.C. §1254(1).

Questions Presented

1. Whether this Court's conclusion in Regents of the University of California v. Bakke, ___U.S.___, 46 U.S.L.W. 4896 (1978), that Title VI of the 1964 Civil Rights Act, 42 U.S.C. §2000d et seq. requires a finding of discrimination to be based upon evidence of conduct violating the constitutional intent standard applies to the Emergency School Aid Act ("ESAA"), 20 U.S.C. 1601 et seq.?

2. Did the Court of Appeals for the Second Circuit err in holding in this case that the Department of Health, Education and Welfare ("HEW") may reject

a school district's application for ESAA funding solely upon the basis of a finding of disparate racial impact and without a finding under the constitutional intent standard that the school district has purposefully and intentionally discriminated against any group on the basis of race?

3. Has HEW overstepped the limits of its administrative power by imposing a standard of review which is so burdensome as to be virtually unchangeable in the courts?

Relevant Constitutional and Statutory Provisions

The Fourteenth Amendment to the Constitution:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Emergency School Aid Act, 42 U.S.C. § 1601:

> (a) The Congress finds that the process of eliminating or preventing minority group isolation and improving the quality of education for all children often involves the expenditure of additional

> funds to which local educational agencies do not have access.
>
> (b) The purpose of this chapter is to provide financial assistance -
>
> (1) to meet the special needs incident to the elimination of minority group segregation and discrimination among students and faculty in elementary and secondary schools;
>
> (2) to encourage the voluntary elimination, reduction, or prevention of minority group isolation in elementary and secondary schools with substantial proportions of minority group students; and
>
> (3) to aid school children in overcoming the educational disadvantages of minority group isolation.

Emergency Schoool Aid Act, 20 U.S.C. §1602:

> (a) It is the policy of the United States that guide-

lines and criteria established pursuant to this chapter shall be applied uniformly in all regions of the United States in dealing with conditions of segregation by race in the schools of the local educational agencies of any State without regard to the origin or cause of such segregation.

(b) It is the policy of the United States that guidelines and criteria established pursuant to title VI of the Civil Rights Act of 1964 and section 182 of the Elementary and Secondary Education Amendments of 1966 shall be applied uniformly in all regions of the United States in dealing with conditions of segregation by race whether de jure or de facto in the schools of the local educational agencies of any State without regard to the origin or cause of such segregation.

Title VI of the 1964 Civil Rights Act, 42 U.S.C. §2000d:

> No person in the United United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Elementary and Secondary Education Amendments of 1966, §182, 42 U.S.C. §2000d-5:

> The Commissioner of Education shall not defer action or order action deferred on any application by a local educational agency for funds authorized to be appropriated by this Act, by the Elementary and Secondary Education Act of 1965, by the Act of September 30, 1950 (Public Law 815, Eighty-first Congress), or by the Cooperative Research Act, on the basis of alleged noncompliance with the provisions of this subchapter for more than sixty days after notice is given to such local agency of such deferral unless such local agency is given

the opportunity for a hearing as provided in section 2000d-1 of this title, such hearing to be held within sixty days of such notice, unless the time for such hearing is extended by mutual consent of such local agency and the Commissioner, and such deferral shall not continue for more than thirty days after the close of any such hearing unless there has been an express finding on the record of such hearing that such local educational agency has failed to comply with the provisions of this subchapter: Provided, That, for the purpose of determining whether a local educational agency is in compliance with this subchapter, compliance by such agency with a final order or judgment of a Federal court for the desegregation of the school or school system operated by such agency shall be deemed to be compliance with this subchapter, insofar as the matters covered in the order or judgment are concerned.

Elementary and Secondary Education Amendments of 1970, 42 U.S.C. §2000d-6

(a) It is the policy of the United States that guidelines and criteria established pursuant to title VI of the Civil Rights Act of 1964 and section 182 of the Elementary and Secondary Education Amendments of 1966 dealing with conditions of segregation by race, whether de jure or de facto, in the

schools of the local educational agencies of any State shall be applied uniformly in all regions of the United States whatever the origin or cause of such segregation.

(b) Such uniformity refers to one policy as may be provided pursuant to law applied uniformly to de facto segregation wherever found.

(c) Nothing in this section shall be construed to diminish the obligation of responsible officials to enforce or comply with such guidelines and criteria in order to eliminate discrimination in federally-assisted programs and activities as required by title VI of the Civil Rights Act of 1964.

(d) It is the sense of the Congress that the Department of Justice and the Department of Health, Education, and Welfare should request such additional funds as may be necessary to apply the policy set forth in this section throughout the United States.

Preliminary Statement

This Court is presented with the opportunity to consider the application of

its decision in Regents of the University of California v. Bakke, supra, with respect to the test of discrimination to be used under Title VI of the 1964 Civil Rights Act, 42 U.S.C. §2000d et seq. in a controversy involving local eligibility for a federally funded program. In Bakke, a majority of this Court concluded that a violation of Title VI must be established by evidence of constitutionally proscribed conduct, i.e., intentional or purposeful discrimination. The Court of Appeals in upholding HEW's denial of funding to petitioners under the Emergency School Aid Act ("ESAA"), 20 U.S.C. §1601 et seq., ignored the effect of Bakke on Title VI's eligibility standards for federally funded programs such as ESAA. Instead, the Court of Appeals cited, inter alia, pre-Bakke interpretations of Title VI eligibility standrads as set forth in

Lau v. Nichols, 414 U.S. 563 (1974), which are of doubtful validity, in concluding that the disparate racial impact test rather than the constitutionally mandated standard of intentional and purposeful discrimination suffices to establish a violation of Title VI and consequently ESAA. Also presented is the issue of Title VI's role as the means for guarding against racial discrimination in federally funded programs and the underlying issue of excessive or unfettered overreaching and interference by HEW with a local educational agency in a manner which effectively precludes any review of these administrative decisions by the judiciary.

Title VI of the 1964 Civil Rights Act, is intended to provide the enforcement power to insure that no discrimination exists in programs which receive federal financial assistance.

The Emergency School Aid Act authorizes a federal grant system to school districts throughout the country to aid these districts in developing programs to meet the special needs incident to the elimination of minority group segregation and discrimination among students and faculty in elementary and secondary schools.

Petitioners contend that ESAA is one of the federal financial assistance statutes which Title VI was designed to enforce. This interpretation is based upon a fair reading of the statutory language of ESAA, upon the available case law and upon logic.

Statement of the Case

In April, 1977, the Board of Education of the City of New York ("the Board") on behalf of itself and several local community school districts submitted an application to HEW for 1977-78 ESAA funding to adminster

programs designed to foster integration and reduce minority student isolation for approximately 40,000 students in elementary and secondary schools in the New York City School District.

Prior to July 1, 1977 the Board was advised by HEW that its application met the minimum qualifications for ESAA funding and that $3.5* million had been earmarked as its share of the 1977-78 appropriation.

However, on July 1, 1977, Defendant Goldberg of HEW notified the Board that its application was denied. Statistics developed

* The total amount of funds earmarked was $17.5 million. This included the allocation for the local community school boards ("CSB's") in New York City. Approximately $14.0 million was released to the CSB's and thus they are not parties to this action. Only the applications of the Central Board and CSB 11 remained outstanding. After the Court of Appeals' decision in this case, CSB 11 resolved its dispute with HEW thus leaving the Board as the only plaintiff.

by the Office of Civil Rights of HEW in a civil rights compliance investigation of the New York City School District, conducted pursuant to Title VI of the 1964 Civil Rights Act, allegedly demonstrated that teacher assignments in some elementary and junior high schools operated by local community school boards and in some high schools operated by the City Board resulted in their racial identifiability. Upon notification of ineligibility, the Board and individual community school board applicants participated in "show cause proceedings" pursuant to 45 C.F.R. §185.46. At these proceedings defendant Goldberg ruled that he would limit the agency's inquiry to the accuracy of the statistics upon which HEW made its determination to deny ESAA funding to the various school boards. Thereafter, defend-

ant Goldberg issued an opinion adhering to the July 1, 1977 decision.

The underlying action was commenced in September, 1977 in the District Court for the Eastern District of New York (WEINSTEIN, J.). The Board sought to permanently enjoin defendants from enforcing their determination of July 1, 1977 that it was ineligible for ESAA funding because of alleged discrimination in teacher assignments resulting in racially identifiable schools in violation of 20 U.S.C. §1605 and 45 C.F.R. §185.43(b) (2).

On November 18, 1977 the District Court granted plaintiffs' application for a stay preserving the $3.5 million ESAA fund.*

*ESAA funds in the amount of $3.5 million were earmarked for the Board, while $300,000 was set aside for CSB 11.

On cross-motions for summary judgment and re-argument, the District Court granted judgment for the Board and CSB 11 and remanded their ESAA applications to defendants for de novo consideration consistent with the principles of due process discussed in its opinion.

The opinion rejected defendants' interpretation that, under ESAA, school districts experiencing statistical racial imbalance were ineligible for funding. Instead, the District Court held that under ESAA "discrimination" means de jure or intentional discrimination and that defendants should have considered proof offered by the Board rebutting defendants statistical showing of ethnic disparity. (A copy of the District Court decision is annexed hereto as Appendix III.)

At the de novo proceeding ordered by the District Court, plaintiffs submitted to defendants proof that the current minority and non-minority teacher incidence and distribution resulted from and was affected by State law; demographic changes in the student population of the City schools; neutral date-of-hire seniority practices emanating from collective bargaining agreements; minority representation in the relevant available work force; and incidence and distribution of vacancies in specific teacher license areas.

On March 22, 1978, after the de novo review, defendants again found the Board ineligible for ESAA funding. The Board then moved in the District Court for a preliminary injunction against enforcement of that administrative decision. The District Court consolidated the preliminary

injunction application with trial of the action and rendered final judgment sustaining defendants' denial of ESAA funding for the Board on the basis that the HEW determination was predicated on substantial evidence.

Plaintiffs then applied to the Court of Appeals for the Second Circuit for a stay of the disbursement of the $3.5 million fund pending appellate review. On April 28, 1978, the motion was granted.

In the Court of Appeals, the Board argued that Judge Weinstein was in error in finding that substantial evidence supported HEW's determination that the Board had engaged in discrimination in violation of the constitution, i.e., intentional discrimination. The Court of Appeals (OAKES, BLUMENFELD and MEHRTENS, J.J.), held, however, that it was unnecessary to determine "whether

the evidence supports a finding of purposeful segregative intent." Slip Opinion at 4537. Instead, Judge Oakes, writing for the court, affirmed the result reached by the District Court on the grounds that the evidence supported a finding of discrimination under the disparate racial impact or effects test:

> Here [ESAA], Congress intended to permit grant disqualification not only for purposeful discrimination but also for discrimination evidenced simply by an unjustified disparity in staff assignments.

Slip Opinion at 4539.

On September 5, 1978, petitioners filed a petition for a rehearing with a suggestion for a rehearing en banc. This automatically stayed the issuance of the court's mandate thereby preserving the $3.5 million fund earmarked for the Board. The petition was denied on

October 6, 1978. On October 26 1978, petitioners motioned the Court of Appeals for a stay of the issuance of its mandate pending application to this Court for a writ of certiorari. The motion was granted on October 31, 1978, and thus the $3.5 million fund remains intact pending review by this Court.

Argument

In finding that the disparate racial impact test rather than the constitutional intent standard is applicable to determinations of ineligibility for ESAA funding, the Court of Appeals reasoned that constitutional standards need only be applied when a violation of the Fourteenth Amendment is in issue. Here, the court found the relevant inquiry concerned only a Congressional enactment which validly incorporated a stricter standard, "more protective of minority rights, than constitutional minimums required". Slip Opinion at 4537. The court reasoned that the language of ESAA itself, 20 U.S.C.

§ 1602(a), that "guidelines and criteria be applied uniformly... without regard to the origin of ... discrimination," compelled the interpretation that the stricter disparate impact standard applies. Slip Opinion at 4539.

The Court of Appeals then found that since a violation of Title VI will constitute a violation of ESAA, citing 20 U.S.C. § 1602(b),* and since, according

*20 U.S.C. § 1602(b) provides that the "guidelines and criteria of Title VI "be applied uniformly... without regard to the origin of ... discrimination".

to Judge Oakes, Title VI incorporates the disparate racial impact standard, this weighty burden is applicable to ESAA applicants as well. Slip Opinion at 4539.

While petitioners agree with the Court of Appeals that ESAA ineligibility is predicated on the same standard used to determine whether a Title VI violation exists, petitioners respectfully assert that the Court of Appeals erred in concluding that the disparate racial impact test applies to a determination of violations under Title VI and, consequently, ineligibility for ESAA funding. Petitioners

further assert that the Court of Appeals' reliance on this Court's decision in Lau v. Nichols, supra, as supportive of the applicability of the disparate racial impact test under Title VI and ESAA, is incorrect in light of the clear dilution of that decision by this Court's recent pronouncements in Regents of the University of California v. Bakke, supra. See, also, Village of Arlington Heights v. Metropolitan Housing Development Corporation, 429 U.S.252(1977); Washington v. Davis, 426 U.S. 229 (1976); Keyes v. School District No. 1, Denver, Colorado, 413 U.S. 189 (1973). Petitioners contend that the Court of Appeals erred in

failing to find that evidence of purposeful or intentional discrimination is the necessary predicate for a finding of a Title VI violation and ESAA ineligibility.

(1)

Title VI was enacted in order "to halt federal funding of entities that violate a prohibition of racial discrimination similar to that of the Constitution". Regents of the University of California v. Bakke, supra, 46 U.S.L.W. at 4900 (Powell, J.). In essence, Title VI was designed to police federal funding programs in order to insure that local agencies

and institutions do not use the federal largess to finance racially discriminatory programs.

Nowhere is Title VI's enforcement role more evident than in federal programs designed to fund local educational agencies. The 1966 Amendment*, to the Elementary and Secondary Education Act of 1965, the enactment that provides the City of New York with more than one-half of all its federal reimbursement funding, was actually codified as an addition to Title VI (i.e., 42 U.S.C. § 2000d-5). Section 182 concerns the application of various proce-

*P.L. 89-750 § 182, 80 Stat. 1209

dural rights to local educational agencies found to be in violation of Title VI and thus threatened with a denial of funding under this major program. Similarly, the 1970 Amendment* to the Elementary and Secondary Education Act of 1965, which sets forth the policy of applying Title VI in the context of this program, was also codified as an addition to Title VI (i.e., 42 U.S.C. § 2000d-6). It is thus inescapable that funding under Congress' major educational funding program is directly tied to the standards and criteria of Title VI.

*P.L. 91-230 § 2, 84 Stat. 121.

ESAA is cut from the same mold. 20 U.S.C. § 1602(b), which is apparently derived from 42 U.S.C. § 2000d-6, provides:

> It is the policy of the United States that guidelines and criteria established pursuant to Title VI of the Civil Rights Act of 1964 and section 182 of the Elementary and Secondary Education Amendments of 1966 shall be applied uniformly in all regions of the United States in dealing with conditions of segregation by race whether de jure or de facto in the schools of the local educational agencies of any State without regard to the origin or cause of such segregation.*

*As set forth above, section 182 of the Elementary and Secondary Education Amendments of 1966 are codified as an addition to Title VI, 42 U.S.C. § 2000d-5.

Thus, just as the Elementary and Secondary Education Act of 1965, as amended, is intended to comply with the mandate of Title VI, so to is ESAA intended to promote the policies of non-discrimination enunciated in the 1964 Civil Rights Act.*

Indeed, the link between Title VI and ESAA was recognized by the Court of Appeals:

> Moreover, the ESAA proscription against employment discrimination forbade discriminatory acts and

* Significantly, whereas the Elementary and Secondary Education Act of 1965, as amended, provides the New York City public School system with more than 50% of all its yearly federal reimbursement funding, allocations under ESAA amount to less than 5% of reimbursement funds.

> practices which violate statutory civil rights provisions such as Title VI of the Civil Rights Act of 1964.

Slip Opinion at 4539. Thus, an express purpose of ESAA, as set forth in 20 U.S.C. § 1602(b), and recognized by the Court of Appeals, is to promote the policies of non-discrimination enunciated in Title VI of the Civil Rights Act of 1964. As a consequence, the test for racial discrimination contained in Title VI (as set forth in Bakke) applies to eligibility for ESAA funding as well.

Until this Court's recent landmark decision in Regents of the University of California v. Bakke,

supra, the test for determining racial discrimination under Title VI appeared to be the disparate impact test. Lau v. Nichols, 414 U.S. 563 (1974). That is, even without evidence of purposeful and intentional discrimination, where statistical evidence reveals that policies or programs have an adverse effect on a particular racial group, that will be sufficient to support a prima facie finding of racial discrimination under Title VI. This approach was radically altered, however, by this Court's decision in Bakke. Bakke establishes that the constitutional or purposeful intent standard is the correct standard for determining whether

discrimination in violation of Title VI has taken place. In Bakke, Justice Powell remarked:

> ...Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment.

46 U.S.L.W. at 4901. Similarly, in an opinion in which Justices White, Marshall and Blackmun joined, Justice Brennan stated:

> In our view, Title VI prohibits only those uses of racial criteria that would violate the Fourteenth Amendment if employed by a State or its agencies.

46 U.S.L.W. at 4912. Justice Brennan went on to reiterate this interpreta-

tion of Title VI and in the process to cast grave doubt on the continued viability of Lau v. Nichols, supra:

> However, even accepting Lau's implication that impact alone is in some contexts sufficient to establish a prima facie violation of Title VI, contrary to our view that Title VI's definition of racial discrimination is absolutely coextensive with the Constitution's, this would not assist the respondent in the least.

46 U.S.L.W. at 4918 (emphasis added). See also, 46 U.S.L.W. at 4927 (opinion of Justice White) and 46 U.S.L.W. at 4931 (opinion of Justice Blackmun).

Thus, notwithstanding whatever standards courts have applied to Title VI analysis in the

past, a majority of this Court in Bakke have established that Title VI's standards for determining racial discrimination are coextensive with constitutional standards.*

*Reference to the remarks of Senator Humphrey, a strong proponent of the 1964 Civil Rights Act, supports this construction of Title VI:

> The existing law of the land is stated in section 601 [42 U.S.C. § 2000d] Section 602 [42 U.S.C. § 2000d-2] of H.R. 7152 do not represent an extension of that law. Those latter sections represent no new power.

110 Cong. Record 5254 (1964). Senator Humphrey later added:

> No new rights are granted here [§§ 601, 602] nor are any taken away; but here we have a prescribed means of enforcing these rights.

Id. 5255

Inexplicably, however, the Court of Appeals totally ignored Bakke in its discussion of Title VI.*

By failing to consider this Court's construction of Title VI as set forth in Bakke, the Court of Appeals' reasoning was fatally defective. For if, as the court stated, the Title VI standard of racial discrimination is "significant" in

*Yet, it is interesting to note that the Court of Appeals specifically cited Bakke's apparent approval of a disparate impact test under Title VII of the 1964 Civil Rights Act.

construing the correct standard for determining eligibility under ESAA, it is significant that the court failed to consider Bakke's effect on the Title VI. Slip Opinion at 4538-4539.

(2)

By failing to take account of Bakke in relying on Title VI as a basis for concluding that ESAA incorporates the disparate racial impact test, the Court of Appeals avoided the essential inquiry of whether ESAA contains a separate and distinct standard from

Title VI that would justify a denial of ESAA funding where there is only a disparate racial impact. For it is clear that after Bakke, application of Title VI standards to review of eligibility for ESAA funding requires that constitutionally prohibited conduct be demonstrated before ESAA ineligibility may be established. The Court of Appeals failed to directly decide the question of separate eligibility standards under ESAA since it held, notwithstanding Bakke, that both ESAA and Title VI employ the disparate racial impact standard.

In order to resolve this issue, it is essential to recognize that interpreting 20 U.S.C. §1602(a) as incorporating the disparate racial impact test, as did the Court of Appeals, makes 20 U.S.C. §1602(b), which incorporates the post-Bakke Title VI constitutional intent standard, superfluous. That is, the more stringent disparate impact test necessarily incorporates the less stringent constitutional intent test and thus obviates the need for the more liberal standard. It is well established that construing a statutory provision as superfluous is contrary to recognized rules of statutory construction and thus invalid. Cf. United States v. Menasche, 348 U.S. 528, 538-539 (1955); Zeigler Coal Co. v. Kleppe, 536 F. 2d 398 (D.C. Cir. 1976).

Instead, petitioners submit that ESAA's standards for determining eligibility for funding are absolutely and exclusively coextensive with the standards for determining racial discrimination under Title VI. At least two Federal Court decisions support this conclusion, Bradley v. Milliken, 432 F. Supp. 885 (E.D. Mich. 1977); Robinson v. Vollert, 411 F. Supp. 461(S.D. Tex. 1976). It was held in Bradley that:

> ESAA does not enhance HEW's power to apply eligibility criteria above and beyond Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d.

461 F. Supp. at 866. In so holding, the Bradley Court relied on Robinson where the issue was whether ESAA

permitted HEW to review the sufficiency of a federal court desegregation order in determining whether ESAA's eligibility requirements had been met. After a review of ESAA's legislative history in a futile attempt to identify the relevant Congressional intent, the court turned to Title VI for guidance. Title VI, the Robinson court found, is "intimately related" to ESAA and therefore the rule under Title VI would apply to ESAA as well. Robinson v. Vollert, supra, 411 F. Supp.

at 475. The court made no intimation that ESAA might contain some basis, independent of Title VI, that would justify a result different from that mandated by the 1964 Civil Rights Act. Accordingly, in Robinson, Title VI's recognized proscription of administrative review of the sufficiency of federal court desegration

orders was applied to ESAA.*

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* Quoting from Stribling v. United States, 419 F. 2d 1350, 1352-53 (8th Cir. 1969), the Robinson court remarked:

> '...where the interpretation of a particular statute at issue is in doubt, the express language and legislative construction of another statute not strictly in pari materia but employing similar persons, things or cognate relationships may control by force of analogy.'

Robinson v. Vollert, supra, 411 F. Supp. at 475 n. 31. See, Overstree v. North Shore Corp., 318 U.S. 125, 131-132 (1943).

No other federal courts have so closely scrutinized the relationship between ESAA and Title VI. Accordingly, it is respectfully submitted that the reasoning in Bradley and Robinson should be given considerable weight by this Court in reviewing petitioners' argument that the correct and sole eligibility standard for ESAA funding must be found in Title VI. And, as stated above, this Court's decision in Regents of the University of California v. Bakke, requires that the constitutional intent test is the applicable standard under Title VI, and thus ESAA as well.

(3)

Underlying the present controversy between the City of New York and HEW is the serious question of the relationship between this major federal administrative agency and local school authorities. HEW is of the view that disparate racial impact per se constitutes ineligibility for ESAA funding; the ESAA applicant's justifications for the racial statistics are irrelevant. The Court of Appeals in this case has apparently taken a less extreme position in that it considered the Board's justifications for the challenged teacher assignments, although finding them to be inadequate to rebut the prima facie showing of discrimination. However, the net effect of the Second Circuit's decision is to require a local educational agency to meet a

virtually insurmountable burden in justifying a statistical showing of disparate racial effect. As a result, HEW's authority to interfere with the local educational process is greatly enhanced. And concommitantly, adoption of its disparate racial impact test significantly dilutes the judicial power to review administrative decisions.

Indeed, District Court Judge Jack B. Weinstein, in a pending related case arising out of HEW's decision to deny the Board's 1978-79 application for ESAA funding,* evidenced concern over the practical effect of the Court of Appeals ruling in this case:

*Board of Education, et al. v. Califano, et al. 78C2135(E.D.N.Y). Judge Weinstein has entered an injunction in that case maintaining the fund earmarked for the Board and has remanded the Board's application to HEW to determine if the Board is entitled to a waiver of ineligibility under 20 U.S.C. §1605.

> The net result of these two* cases is to make practically unreviewable any insistence by HEW directed to a unit such as the Board of Education of the City of New York to changes being made in its practices with respect to assignment of teachers.
>
> Under these circumstances, practically, the City has no alternative but to "voluntarily" agree to any conclusions and demands of HEW. Again, this may be a perfectly sound position and this Court has no objection to it, but the combined implications with respect to a shift of power from the Courts to HEW and from local education authorities (to) the national education authorities, is so grave as to warrant full consideration by the appellate courts of this nation.

Board of Education v. Califano, No. 78C 2135 (E.D.N.Y.) transcript of September 28, 1978 proceedings on plaintiff's motion for

*Judge Weinstein is referring here to the Court of Appeals decision in the instant case and Caulfield v. Board of Education, No. 78C 6035 (2d Cir., September 5, 1978) (attached hereto as Appendix IV.) Caulfield held that an agreement reached between HEW and the Board to resolve the Title VI violation letter which provided the underlying data upon which the Board's ESAA application was denied, was not voluntary and, therefore, was void.

a temporary restraining order at p. 10 (attached hereto as Appendix V).

In conclusion, this case presents the Court with the opportunity to clarify, in light of Bakke, Title VI's enforcement role and applicability to a federally funded program designed to eliminate the effects of racial discrimination. Also presented is the opportunity to determine whether the effects of the Court of Appeals' decision, as articulated above by Judge Weinstein, are in accord with this Court's notion of federalism and the role of the judiciary in resolving disputes between the federal bureaucracy and local agencies.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX I

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1121, 1414—September Term, 1977.

(Argued May 26, 1978 Decided August 21, 1978.)

Docket Nos. 78-6083, 78-6088

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK *et al.*,

Appellants,

v.

JOSEPH A. CALIFANO, JR., SECRETARY, UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE *et al.*,

Appellees.

Before:

OAKES, *Circuit Judge,* and BLUMENFELD* and MEHRTENS,** *District Judges.*

Appeals from orders of the United States District Court for the Eastern District of New York, Jack B. Weinstein, *Judge,* affirming Department of Health, Education and Welfare's denial of grant applications for Emergency School Aid Act funds.

Affirmed.

* Of the District of Connecticut, sitting by designation.

** Of the Southern District of Florida, sitting by designation.

ROSEMARY CARROLL, Assistant Corporation Counsel (Allen G. Schwartz, Corporation Counsel of the City of New York, Leonard Koerner, Assistant Corporation Counsel, of counsel), *for Appellants.*

RICHARD B. CARO, Assistant United States Attorney (David G. Trager, United States Attorney for the Eastern District of New York, Harvey M. Stone, Rodger C. Field, Assistant United States Attorneys, of counsel), *for Appellees.*

OAKES, *Circuit Judge:*

Consolidated appeals raise the important question whether in passing upon applications for grants of Emergency School Aid Act (ESAA)[1] funds the Department of Health, Education and Welfare (HEW) must apply a constitutional standard of intentional discrimination as delineated by the Supreme Court[2] or whether the ESAA as

1 20 U.S.C. §§ 1601-19.

2 *Dayton Bd. of Educ.* v. *Brinkman,* 433 U.S. 406, 413 (1977); *Village of Arlington Heights* v. *Metropolitan Housing Dev. Corp.,* 429 U.S. 252, 268-69 (1977); *Washington* v. *Davis,* 426 U.S. 229, 242 (1976); *Keyes* v. *School Dist. Number One,* 413 U.S. 189, 201-03 (1973). These cases, interpreting the Fourteenth Amendment, hold that a "finding that the pupil population in the various [city, town or village] schools is not homogeneous, standing by itself, is not a violation of the Fourteenth Amendment in the absence of a showing that this condition resulted from intentionally segregative actions on the part of the Board." *Dayton Bd. of Educ.* v. *Brinkman, supra,* 433 U.S. at 413. Six members of the Supreme Court appear to be on record that this involves "[f]indings as to the motivations of multi-membered public bodies . . . ." *Id.* at 414. A seventh, Mr. Justice Stevens, while agreeing with this broad proposition, has expressed the qualification that such a finding "necessarily depends primarily on objective evidence concerning the effect of the Board's action, rather than the subjective motivation of one or more members of the Board . . . ." *Id.* at 421 (Stevens, *J.*, con-

supplemented by HEW regulations permits application of a disproportionate impact standard of discrimination. Appellants are respectively the Board of Education of the City School District of the City of New York (the Central Board) and the Community School Board (CSB) of Community School District 11 (District 11).

The two school boards sued to enjoin HEW from holding them ineligible for ESAA assistance. The United States District Court for the Eastern District of New York, Jack B. Weinstein, *Judge*, initially upheld HEW's denial of ESAA funds. But upon the Central Board's motion for reargument, the district court vacated its prior decision and remanded the matter to HEW for "further consideration" to determine if the school boards' disqualification resulted from unconstitutional discrimination as well as from violations of the applicable regulations. After remand the district court affirmed HEW's conclusion that substantial evidence warranted a finding of both unconstitutional discrimination and discrimination in violation of the ESAA. Accordingly, it entered a final order granting judgment in favor of HEW. We affirm the judgment on the basis that the standards of the statute and regulation have been satisfied.

I. *Statutory Scheme*

On an annual basis, the ESAA provides special assistance to local educational agencies and other eligible organizations to achieve three basic statutory objectives:

curring); *see Washington* v. *Davis*, *supra*, 426 U.S. at 253-54 (Stevens, J., concurring). For an exhaustive discussion of impact and motive, *see* Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication*, 52 N.Y.U.L. Rev. 36, 42-50, 99-105 (1977). *See also Arthur* v. *Nyquist*, 573 F.2d 134 (2d Cir.), *petition for cert. filed*, 47 U.S.L.W. 3010 (U.S. July 18, 1978).

(1) to meet the special needs incident to the elimination of minority group segregation and discrimination among students and faculty in elementary and secondary schools;

(2) to encourage the voluntary elimination, reduction, or prevention of minority group isolation in elementary and secondary schools with substantial proportions of minority group students; and

(3) to aid school children in overcoming the educational disadvantages of minority group isolation.

20 U.S.C. § 1601(b). Thus, the ESAA is a program purposefully designed "to aid in desegregating schools and support quality integrated schools." [3]

3 S. Rep. No. 604, 92d Cong., 2d Sess. (1972), *reprinted in* [1972] U.S. Code Cong. & Ad. News 2595, 2600. Funds granted under the ESAA are apportioned on a numerical basis, on "the relative number of minority group children enrolled in the elementary and secondary schools of each State . . . ." *Id.* at 2601. An important congressional objective, incorporated in the statute itself, is "the elimination of minority group isolation to the maximum extent possible" in all the schools of a given district, *id.*, thereby seeking with federal funding to carry out the longstanding commands of *Brown* v. *Board of Educ.*, 347 U.S. 483, 493 (1954) (segregation of children in public schools solely on the basis of race, even though the physical facilities and other tangible factors may be equal, deprives minority children of equal educational opportunities).

The House-Senate Conference Committee reported:

> *Purpose.*—The House amendment stated the purpose of the title as providing *financial assistance to meet the special needs incident to desegregation* and *to encourage voluntary integration*. The Senate amendment stated the purpose as encouraging comprehensive planning for the elimination of minority group isolation, as providing financial assistance to establish stable, quality, integrated schools, as assisting in eliminating minority group isolation, and as aiding schoolchildren in overcoming the educational disadvantages of minority group isolation. The conference substitute retains the House provision with the one addition of the Senate reference *to aiding schoolchildren in overcoming the educational disadvantages of minority group isolation.*

Each year that an application for ESAA assistance is submitted, the application is evaluated and the eligibility of the applicant reviewed. ESAA funds are awarded to qualified applicants in the order in which their applications are ranked. The ranking depends on compliance with specified guidelines and criteria, the most important being "objective" in nature. 45 C.F.R. § 185.14(a), (b) & (c).[4]

Policy with respect to the application of certain provisions of federal law.—The House amendment stated the policy of the United States that guidelines and criteria established pursuant to this title *shall be applied uniformly in all regions of the United States* in dealing with conditions of segregation by race in the schools of the local educational agencies of any State without regard to the origin or cause of such segregation. The Senate amendment stated the policy of the United States that guidelines and criteria established pursuant to Title VI of the Civil Rights Act, section 182 of the Elementary and Secondary Education Amendments of 1966, and this title *shall be applied uniformly in all regions of the United States* in dealing with conditions of segregation by race *whether de jure or de facto* in the schools of the local educational agencies of any State without regard to the origin or cause of such segregation. The conference substitute retains both the Senate and House provisions but deletes the reference in the Senate amendment to this title. The conference substitute's version of the Senate provision, therefore, restates the policy contained in section 2(a) of Public Law 91-230 and in no way supercedes [*sic*] subsection (b) of such section.

Conf. Rep. No. 798, 92d Cong., 2d Sess. (1972), *reprinted in* [1972] U.S. Code Cong. Ad. & News 2608, 2662-63 (emphasis added). Thus, superimposed upon the underlying purposes of the ESAA is a requirement of uniform application throughout the country, irrespective of the origin or cause of segregation. This is expressed in 20 U.S.C. § 1602(a) as follows:

> It is the policy of the United States that guidelines and criteria established pursuant to this chapter shall be applied uniformly in all regions of the United States in dealing with conditions of segregation by race in the schools of the local educational agencies of any State without regard to the origin or cause of such segregation.

4 Eighty "points are awarded on the basis of 'objective criteria,' as follows: 30 points on the basis of "need" as determined by the number and percentage of minority group children in the applicant's schools

The ESAA program is competitive in nature since the amount appropriated by Congress is less than the total amount of the grants sought; only those applications which meet ESAA objectives to the greatest extent possible are the ones which receive the awards. *Id.* § 185.14(c)(4).

In addition to filing applications which are timely[5] and which meet the minimal technical/qualitative criteria, *see* 20 U.S.C. §§ 1605(a), 1606-09;[6] 45 C.F.R. § 185.14,[7] the applicant must establish that it has not engaged in any of the four disqualifying acts, practices, policies or procedures condemned by the statutes and regulations. 20 U.S.C. § 1605(d)(1);[8] 45 C.F.R. § 185.13(*l*).[9] The Assistant

as compared to other school districts in the state; 50 points on the basis of "the effective net reduction in minority group isolation" (in terms of the number and percentage of children affected) or, in the case of certain types of assistance applications, the "effective net prevention of minority group isolation." 45 C.F.R. § 185.14(a) (1977). In addition to points awarded for objective criteria, 45 "points" are awarded on the basis of (1) "needs assessment," (2) "statement of objectives," (3) "activities" (including specificity of project design, staffing, delivery of services, and parent and community involvement), (4) "resource management" and (5) "evaluation." The point awards are determined by the Assistant Secretary who is authorized to seek expert assistance. *Id.* § 185.14(b). Criteria for funding include (1) program cost and (2) amount of funds available for assistance within the state in relation to other pending state applications. *Id.* § 185.14(c)(1). Fewer than 40 points under § 185.14(a) or 28 points under § 185.14(b) result in automatic denial (subject to resubmission). *Id.* § 185.14(c)(2) & (3). Section 185.14(c)(4) and (5) establish the procedures for award of funds on the basis of application rank.

5 The Assistant Secretary specifies the times by which applications must be filed, 20 U.S.C. § 1609(e).

6 Some of the criteria are set forth in note 4 *supra.*

7 *See* note 4 *supra.*

8 20 U.S.C. § 1605(d)(1) provides:

> No educational agency shall be eligible for assistance under this chapter if it has, after June 23, 1972—
>
> (A) transferred (directly or indirectly by gift, lease, loan, sale, or other means) real or personal property to, or made any ser-

(footnote 9 appears on page 4522)

Secretary for Education may not approve the application unless it is determined by the Secretary that the applicant

vices available to, any transferee which it knew or reasonably should have known to be a nonpublic school or school system (or any organization controlling, or intending to establish, such a school or school system) without prior determination that such nonpublic school or school system (i) is not operated on a racially segregated basis as an alternative for children seeking to avoid attendance in desegregated public schools, and (ii) does not otherwise practice, or permit to be practiced, discrimination on the basis of race, color, or national origin in the operations of any school activity;

(B) had in effect any practice, policy, or procedure which results in the disproportionate demotion or dismissal of instructional or other personnel from minority groups in conjunction with desegregation or the implementation of any plan or the conduct of any activity described in this section, *or otherwise engaged in discrimination based upon race*, color, or national origin *in the hiring, promotion, or assignment of employees of the agency* (or other personnel for whom the agency has any administrative responsibility);

(C) in conjunction with desegregation or the conduct of an activity described in this section, had in effect any procedure for the assignment of children to or within classes which results in the separation of minority group from nonminority group children for a substantial portion of the school day, except that this clause does not prohibit the use of bona fide ability grouping by a local educational agency as a standard pedagogical practice; or

(D) had in effect any other practice, policy, or procedure, such as limiting curricular or extracurricular activities (or participation therein by children) in order to avoid the participation of minority group children in such activities, which discriminates among children on the basis of race, color, or national origin;

except that, in the case of any local educational agency which is ineligible for assistance by reason of clause (A), (B), (C), or (D), such agency may make application for a waiver of ineligibility, which application shall specify the reason for its ineligibility, contain such information and assurances as the Secretary shall require by regulation in order to insure that any practice, policy, or procedure, or other activity resulting in the ineligibility has ceased to exist or occur and include such provisions as are necessary to insure that such activities do not reoccur after the submission of the application.

(Emphasis added.)

is not ineligible. *See* 20 U.S.C. § 1605(d)(4).[10] While the statute itself forbids discrimination in the hiring, promotion or assignment of teachers, note 8 *supra*, the pertinent regulation in this case is 45 C.F.R. § 185.43(b)(2).[11] In

9 Section 185.13 provides in pertinent part:

Such application shall contain . . .

. . . .

(2)(i) An assurance that the applicant has not had or maintained in effect prior to the date of its application for assistance under the Act, and will not have or maintain in effect subsequent to such date, any practice, policy, or procedure with respect to minority group personnel in violation of § 185.43(b) (or that if such a violation has occurred, application for a waiver of ineligibility has been made to the Secretary); and (ii) a statement of the number of principals, full-time classroom teachers, and athletics head coaches, by race, for the academic year immediately preceding *(a)* the year in which the applicant first implemented any portion of a plan for desegregation or for elimination or reduction of minority group isolation in its schools pursuant to an order of a Federal or State court or administrative agency, or *(b)* the year in which the applicant first implemented any portion of a plan or project described in § 185.11, whichever is earlier, and of the number of principals, full-time classroom teachers, and athletics head coaches, by race, as of the date of its application;

(3)(i) An assurance that the applicant has not had or maintained in effect prior to the date of its application for assistance under the Act, and will not have or maintain in effect subsequent to such date, any procedure for assignment of children to classes in violation of § 185.43(c) (or that if such a violation has occurred, application for a waiver of ineligibility has been made to the Secretary); and (ii) a statement of the total number of children assigned by the applicant as of the date of the application to all-minority or all-nonminority classes for more than 25 percent of the school day classroom periods, with an educational justification or explanation for any such assignments[.]

. . . .

10 20 U.S.C. § 1605(d)(4) provides:

No application for assistance under this chapter shall be approved prior to a determination by the Secretary that the applicant is not ineligible by reason of this subsection.

11 45 C.F.R. § 185.43(b)(2) provides:

No educational agency shall be eligible for assistance under the Act if, after June 23, 1972, it has had or maintained in effect

substance, the regulation makes ineligible for assistance an educational agency which after June 23, 1972, has utilized a procedure resulting, *inter alia*, in the discriminatory "assignment of full-time classroom teachers to the schools of such agency in such a manner as to identify any of such schools as intended for students of a particular race, color, or national origin." [12]

II. *Underlying Facts*

Teaching and supervisory appointments to public schools in New York City are now and have traditionally been made by the Chancellor of the Central Board. High school teachers are appointed by the Chancellor from a list of eligible candidates.[13] The list of eligible candidates is prepared by the Board of Examiners, which ranks each candidate on the basis of a competitive examination.[14]

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any other practice, policy, or procedure which results in discrimination on the basis of race, color, or national origin in the recruiting, hiring, promotion, payment, demotion, dismissal, or assignment of any of its employees (or other personnel for which such agency has any administrative responsibility) . . . .

12 *Id.* Only the Secretary of HEW himself may grant waivers of the disqualifying practices. *See* 20 U.S.C. § 1605(d)(1), (2) & (3).

13 (a) The chancellor shall appoint and assign teachers for all schools and programs under the jurisdiction of the city board from persons on competitive eligible lists.

(b) The chancellor shall appoint and assign all supervisory personnel for all schools and programs under the jurisdiction of the city board from persons on qualifying eligible lists.

(c) Each community board shall appoint teachers for all schools and programs under its jurisdiction who are assigned to the district by the chancellor from competitive eligible lists. Insofar as practicable the chancellor, when making such assignments shall give effect to the requests for assignment of specific persons by the community board. The community board shall appoint such teachers to schools within such district within thirty days if such appointment is to be effective on a date subsequent thereto and within three days if such appointment is to become effective immediately. . . .

N.Y. Educ. Law § 2590-j(4)(a)-(c) (McKinney 1970).

14 3.(a)(1) The board of examiners shall prepare and administer objective examinations to determine the merit and fitness of all candidates for teaching and supervisory service positions, other than the positions of chancellor, executive deputy city superintendent, deputy city superintendent, assistant city superintendent and community superintendent. Examinations for teaching positions may consist in part of the National Teachers Examination administered by the Educational Testing Service of Princeton, New Jersey.

. . . .

(b)(1) Examinations for teaching positions shall be open competitive.

(2) Examinations for all supervisory service positions shall be open qualifying.

(3) The board of examiners may establish an eligible list for any class of positions for which it finds inadequate numbers of qualified persons available for recruitment. Such examination shall, so far as practicable, be constructed and rated so as to be equivalent. Candidates who pass any such examination and who are otherwise qualified shall be placed on such list in the rank corresponding to their grade. . . .

(c) All lists of eligibles for supervisory or administrative positions which are in existence and which were placed in abeyance, and appointments from which were prohibited by a temporary restraining order of the United States District Court on the twenty-third day of July nineteen hundred seventy-one, or the preliminary injunction of the said court dated September seventeenth, nineteen hundred seventy-one, continuing such prohibition, and of which lists those that are scheduled to expire prior to March first, nineteen hundred seventy-five shall be deemed extended to March first, nineteen hundred seventy-five, as though such were the date on which such lists were originally scheduled to terminate or expire.

Id. § 2590-j(3) (McKinney Supp. 1977). Reference in subparagraph (c) is presumably to the litigation in *Chance* v. *Board of Examiners*, 330 F. Supp. 203 (S.D.N.Y. 1971), *aff'd*, 458 F.2d 1167 (2d Cir. 1972) (preliminary injunctive relief upheld). *See generally Chance* v. *Board of Examiners*, 561 F.2d 1079 (2d Cir. 1977); *Chance* v. *Board of Examiners*, 534 F.2d 993 (2d Cir. 1976), *cert. denied*, 431 U.S. 965 (1977); *Chance* v. *Board of Educ.*, 496 F.2d 820 (2d Cir. 1974).

New York City and Buffalo, we are informed, are the only New York school districts which administer local teacher examinations in addition to the state licensing requirements. Buffalo's procedures have also been the subject of litigation. *Arthur* v. *Nyquist*, *supra*.

In 1969 the New York City school system was "decentralized" and thirty-two separate community school districts (CSDs) were established. Each CSD was vested with primary authority over the operation of the elementary and junior high schools within its district.[15] Although the Chancellor alone appoints high school teachers, elementary and junior high school teachers may be appointed in either of two ways. One of these is the traditional method of assignment by the Chancellor. The community school boards must abide by the Chancellor's designation.[16] However, the Chancellor "insofar as practicable . . . shall give effect to the requests for assignment of specific persons by the community board.[17] An alternative method is available for use only in those elementary and junior high schools whose students rank in the lower 45% on a comprehensive reading examination which is administered annually to students in schools within the jurisdiction of the local community districts.[18] The community school districts

15 Each community board shall have all the powers and duties, vested by law in, or duly delegated to, the local school board districts and the board of education of the city district on the effective date of this article, not inconsistent with the provisions of this article and the policies established by the city board, with respect to the control and operation of all pre-kindergarten, nursery, kindergarten, elementary, intermediate and junior high schools and programs in connection therewith in the community district.

N.Y. Educ. Law § 2590-e (McKinney Supp. 1977).

16 *See id.* § 2590-j(4)(c) (McKinney 1970). *quoted in* note 13 *supra.*

17 *Id.*

18 The chancellor shall cause a comprehensive reading examination to be administered to all pupils in all schools under the jurisdiction of the community districts annually. Prior to October first of every year each school shall be ranked in order of the percentage of pupils reading at or above grade level as determined by such examination, in accordance with rules to be promulgated by the chancellor.

Id. § 2590-j(5)(a) (McKinney Supp. 1977).

may directly appoint teachers to such "45% schools" if the individual has passed either a qualifying examination prepared by the Board of Examiners or the National Teachers Examination.[19]

Irrespective of how the teachers are appointed, ultimate control still remains with the Chancellor. He retains the power to rescind illegal teacher assignments and to compel a local board's compliance with all applicable provisions of law.[20] In addition, he is vested with all powers and duties

19 The board of each eligible school may . . . appoint any person a teacher in such school . . . without regard to any competitive eligibility lists . . . provided that such person, will . . . have the education and experience qualifications for certification as a teacher . . . and shall have:

(i) passed a qualifying examination to be prepared and administered by the board of examiners, . . . or be on an existing competitive eligible list for such position; or

(ii) passed the National Teachers Examination within the past four years at a pass mark equivalent to the average pass mark required of teachers during the prior year by the five largest cities in the United States which use the National Teachers Examination as a qualification, as determined by the chancellor.

Id. § 2590-j(5)(c) (McKinney 1970).

20 1. If, in the judgment of the chancellor any community board fails to comply with any applicable provisions of law, by-laws, rules or regulations, directives and agreements, and after efforts at conciliation with such community board have failed, he may issue an order requiring the community board to cease its improper conduct or to take required action and consistent with the provisions of this article and the educational and operational policies of the city board, may enforce that order by the use of appropriate means, including:

(a) supersession of the community board by the chancellor or a trustee appointed by him with respect to those powers and duties of such community board deemed necessary to ensure compliance with the order; and

(b) suspension or removal of the community board or any member or members thereof.

Id. § 2590-l.

of the superintendent of schools of the city district[21] which include "the power to transfer teachers from one school to another." [22]

The ESAA applications here at issue were for grants in the 1977-78 school year. *See* note 34 *infra*. To analyze whether there was compliance with the statute and regulations, HEW used 1975-76 data. Racial and ethnic statistics[23] demonstrated that in school year 1975-76 62.6% of high school students were minority students whereas 8.2% of high school teachers were minority teachers.[24] Seventy per cent of minority high school teachers were assigned to high schools in which minority student enrollment exceeded

21 *Id.* § 2590-h (McKinney Supp. 1970).

22 The superintendent of schools of a city shall possess, subject to the by-laws of the board of education, the following powers and be charged with the following duties:

. . . .

6. To have supervision and direction of associate, assistant, district and other superintendents, directors, supervisors, principals, teachers, lecturers, medical inspectors, nurses, auditors, attendance officers, janitors and other persons employed in the management of the schools or the other educational activities of the city authorized by this chapter and under the direction and management of the board of education; to transfer teachers from one school to another, or from one grade of the course of study to another grade in such course, and to report immediately such transfers to said board for its consideration and action; to report to said board of education violations of regulations and cases of insubordination, and to suspend an associate, assistant, district or other superintendent, director, supervisor, expert, principal, teacher or other employee until the next regular meeting of the board, when all facts relating to the case shall be submitted to the board for its consideration and action.

Id. § 2566-6 (McKinney 1970).

23 An injunction against the collection of such racial data has been sought in a related action. *Caulfield* v. *Board of Educ.*, No. 78-6035 (2d Cir. filed Feb. 28, 1978).

24 In the case of District 11 in 1975-76, 11.2% of its elementary school teachers and 63.9% of its elementary school students were members of minority groups.

70%, even though these high schools employed only 48% of the system's high school teachers. Conversely, in high schools in which there were proportionately a low number of minority teachers, minority student enrollments were below 40%.[25]

25 The high schools with proportionately a high or low number of minority teachers are as follows:

High Schools With Minority Student Enrollments Over 90%		*% Minority Teachers*
Harlem	100%	70.0%
Ben Franklin	98.3	27.9
Park East	93.8	40.0
Harlem Prep	98.4	69.2
Lower East Side	100	63.2
M. L. King, Jr.	96.0	25.0
Satellite Acad.	92.7	25.0
Jane Addams	98.7	34.3
Boys & Girls	99.9	20.9
Eastern District	97.0	18.0
Bushwick	94.2	20.4
Pacific	99.8	37.5
Redirection	97.7	47.6
August Martin	97.6	16.7
High Schools With Minority Student Enrollments Under 40%		*% Minority Teachers*
Stuyvesant	31.0%	2.8%
Bronx H.S. of Science	31.3	2.8
Lafayette	29.2	0.6
Midwood	32.6	1.7
Abraham Lincoln	37.0	0.7
James Madison	35.6	0.9
New Utrecht	22.5	0.0
Fort Hamilton	30.0	3.7
Sheepshead Bay	32.5	3.7
F.D. Roosevelt	29.4	1.8
South Shore	36.9	2.4
William Grady	22.2	0.0
Benjamin Cardoza	38.5	3.2
Francis Lewis	36.9	1.7
Forest Hills	38.8	0.8
Long Island City	30.2	2.8
Richmond Hill	28.5	3.4

(Table continued on next page)

Similar correlations between the racial/ethnic composition of the faculty of community school districts and the racial/ethnic composition of the student bodies within those school districts exist. For the same school year, 14.3% of the teachers and 69.7% of the students in elementary schools were minority, and 16.7% of the teachers and 70.1% of the junior high school students were minority. Quite clearly, the schools with minority student enrollments over 90% identifiably had the highest percentage of minority faculty by a substantial margin.[26] Similarly, community school districts with minority student enrollments under 50% contained a disproportionately low percentage of minority factulty.[27]

(continued from preceding page)

High Schools With Minority Student Enrollments Under 40%		*% Minority Teachers*
Bayside	30.4	1.3
New Dorp	4.3	0.0
Curtis	32.1	3.0
Tottenville	3.7	1.9
Susan E. Wagner	13.0	2.5
Ralph McKee	19.1	3.1

26

CSDs With Minority Student Enrollments Over 90%		*% Minority Teachers*
CSD # 1	93.6%	10.4%
4	98.8	24.6
5	99.2	56.7
7	99.0	27.9
9	97.7	26.9
12	98.3	26.7
13	97.0	34.7
14	90.3	14.6
16	99.6	39.0
17	96.1	16.8
19	91.5	12.2
23	99.6	30.0

27

CSDs With Minority Student Enrollments Under 50%		*% Minority Faculty*
CSD 20	31.5%	0.4%
21	34.9	2.5

(Table continued on next page)

Upon the "remand" to HEW, HEW found that the racial assignment of faculty in the central school district was, as HEW put it, "strikingly illustrated by the absence of minority teachers" at certain academic, *i.e.*, nonvocational high schools. Ten of these were demonstrated to have a disproportionately low number of full-time minority teachers in the 1975-76 school year. All ten of these schools were among the thirteen academic high schools[28] with full-time faculties having a percentage of black teachers at or below two standard deviations,[29] which was 1.2%; the mean of

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(continued from preceding page)

CSDs With Minority Student Enrollments Under 50%		*% Minority Faculty*
22	29.1	1.7
24	44.0	5.9
25	29.5	2.6
26	25.8	2.7
27	48.4	7.3
30	48.8	6.2
31	16.3	3.1

Other information indicates that ten of the 32 CSDs in New York City employ minority faculty members in excess of 20%. Those CSDs have minority student enrollments varying from 86.7 to 99.6 percent.

28

Academic High Schools	*% black*	*Total teachers*
Stuyvesant	.9	109
Lafayette	.6	166
Midwood	.9	115
Abraham Lincoln	.7	137
James Madison	.9	117
New Utrecht	0.0	163
Fort Hamilton	.6	163
F. D. Roosevelt	1.2	169
Beach Channel	.7	137
Francis Lewis	.8	121
Forest Hills	0.0	125
Bayside	.7	150
New Dorp	0.0	105

29 In *Castaneda* v. *Partida*, 430 U.S. 482, 496-97 & n.17 (1977), a grand jury discrimination case, the Court adopted a statistical methodology used in the social sciences for the prediction of fluctuations from an expected value, known as the standard deviation, defined for the binomial distribution as the square root of the product of the total num-

full-time black teachers in academic high schools systemwide was then 5.2%.

To take another example for the same school year, 8.2% of academic high school teachers in the Central Board's employ were members of minority groups, black or Hispanic. Lafayette High School, for one, with a total of 166 teachers had only one minority teacher, even though it could have been expected based on systemwide statistics

ber in the sample (n) times the probability of selecting a minority (p) times the probability of selecting a non-minority (q), thus $\sqrt{npq}$. To express the standard deviation in proportionate terms, the formula is $\sqrt{\frac{pq}{n}}$. The statistical approach was also utilized by the Court in a school segregation case, *Hazelwood School Dist.* v. *United States*, 433 U.S. 299, 308-09 & n.14 (1977):

> A precise method of measuring the significance of such statistical disparities was explained in *Castaneda* v. *Partida*, 430 U.S. 482, 496-497, n.17. It involves calculation of the "standard deviation" as a measure of predicted fluctuations from the expected value of a sample. Using the 5.7% figure as the basis for calculating the expected value, the expected number of Negroes on the Hazelwood teaching staff would be roughly 63 in 1972-1973 and 70 in 1973-1974. The observed number in those years was 16 and 22, respectively. The difference between the observed and expected values was more than six standard deviations in 1972-1973 and more than five standard deviations in 1973-1974. The Court in *Castaneda* noted that "[a]s a general rule for such large samples, if the difference between the expected value and the observed number is greater than two or three standard deviations," then the hypothesis that teachers were hired without regard to race would be suspect. 430 U.S., at 497 n. 17.

See id. at 311-12 n.17. In this case the standard deviation is 1.94% above or below 5.1%, or p, since the average size of academic high school faculties is 128 teachers, and 94.9% is the non-black force of teachers at those schools. The square root of $\frac{pq}{n}$ is 1.94%. Thus, in reference to the schools listed in note 28 *supra*, all have a standard deviation of two or more: 5.1% (minority teachers in all academic high schools) minus 1.94% (one deviation), 1.94% (a second deviation) = 1.2%. If the same calculations are made for the schools referred to in note 28 *supra* with respect to minorities in the teaching population systemwide (8.2%), the difference between the expected percentage of minority teachers to the actual percentage is of course higher. In the case of Lafayette, it would exceed three standard deviations.

to have had fourteen minority teachers. Lafayette's proportion of minority students was 29.2%.[30] In contrast, for the same year Boys High School in Brooklyn had more than two and one-half times the number of full-time minority teachers than the expected rate; its student body was 99.9% minority.[31]

These substantial disproportions are not contested by the appellants, nor do they deny that the schools were statistically "racially identifiable" as a result of the significant disparities in staff assignments. The claim pressed below and on this appeal has been limited to the argument that the statute and regulation must be construed to require HEW to establish that the disparities resulted from pur-

30 HIGH SCHOOL LAFAYETTE (BROOKLYN)

School Year	Total Full Time Teachers	Expected Percent of Minority Teachers	Expected Number of Minority Teachers	Actual Number of Minority Teachers	Extent of Deviation: Percent of Actual To Expected Number of Minority Teachers	Extent of Deviation: Ratio of Expected To Actual Number of Minority Teachers	Percent [sic] of Minority Students
1971-72	241	6.4%	15	1	6.7%	15:1	20.1%
1972-73	216	6.6%	14	1	7.1%	14:1	23.9%
1973-74	219	7.2%	16	1	6.2%	16:1	25.6%
1974-75	196	7.7%	15	1	6.7%	15:1	27.8%
1975-76	166	8.2%	14	1	7.1%	14:1	29.2%

31 At least four schools within District 11 were racially identifiable. In two schools with less than 40% minority students, there were 3.4% minority teachers in one and none in the second. In two schools with minority student concentrations over 92%, there were 29.8% and 24.1% minority teachers. Data for 1977-78 reveal both a slight improvement and a substantial regression. While HEW removed one school from its unsatisfactory list, the other three remained racially identifiable and three aditional schools were deemed in violation of ESAA criteria.

poseful or intentional discriminaton in the constitutional sense. *See* note 2 ***supra.***

III. *Proceedings Before HEW and the District Court*

Only one of the Central Board's three basic grant applications survived program merit competition and obtained a sufficient rank order standing to be considered for funding.[32] On November 9, 1976, the Office for Civil Rights at HEW wrote to Chancellor Anker that it found that teachers, principals and assistant principals were assigned "in a manner that has created, confirmed and reinforced the racial and/or ethnic identifiability of the system's schools . . . ."[33] By letter dated July 1, 1977,

32 The Central Board and various community school districts in the city filed a total of 32 applications for basic grants, pilot project grants and bilingual project grants under the ESAA. Of the 32, 20 ultimately demonstrated sufficient program merit to warrant approval in competition with other applications; 3 were above minimum program quality, but were not successful in competing with other applicants; and 9 applications were not minimally acceptable. The 20 applications that warranted approval initially could not be funded because all New York City applicants were disqualified under § 1605(d) of the Act. However, all applicants except the Central Board and CSDs 10 and 11 were able to establish their eligibility with the assistance and advice of the Office for Civil Rights either by providing additional material at show cause meetings pursuant to 45 C.F.R. § 185.46(a)(2) or by taking corrective action and filing successful applications for waivers of ineligibility. The federal defendants were thus able to provide $13,509,079 in ESAA grants to eligible New York City community school districts for the 1977-78 school year. The basic grant total awarded New York City applicants comprises approximately 65% of the basic grants awarded to New York State.

The three New York City applicants unable to establish their eligibility did not take the necessary corrective action to obtain waivers of ineligibility. CSD 10 did not sue to challenge the denial of its ESAA application, but CSD 11 ($298,891) and the Central Board ($3,559,132) did sue. Thus the only plaintiffs in this action which have not received funds for which they applied are the Central Board and CSD 11. Essentially CSD 11's application stands or falls with the Central Board's.

33 By letter dated January 18, 1977, to Chancellor Anker OCR concluded that the Central Board had unlawfully failed to make available

HEW notified the Central Board and District 11 that their grant applications could not be funded because they did not establish their eligibility under 45 C.F.R. § 185.43(b)(2).[34] Thereafter, HEW afforded an opportunity to the Central School Board and to District 11 to achieve voluntary resolution and compliance under 42 U.S.C. § 2000d(1),[35]

equal educational services to minority children. These preliminary findings were revised by a letter dated October 4, 1977, and became the subject of formal administrative adjudicatory hearings in accordance with 42 U.S.C. § 2000d-1 and 45 C.F.R. § 80.8. The October 4, 1977, OCR letter stated, among other things, that students were being assigned in racially identifiable or isolated instructional settings in violation of Title VI. While this finding would also constitute a ground for ineligibility under ESAA, 20 U.S.C. § 1605(d)(1)(C)-(D); 45 C.F.R. § 185.43(c)-(d), the Central Board and HEW have settled their differences and entered into a Letter of Agreement.

34 The regulation is quoted in part in note 11 *supra* and in part in text accompanying note 12 *supra*. On June 20, 1978, HEW disapproved the Central Board's 1977-78 ESAA application.

35 42 U.S.C. § 2000d-1 provides in part:

> Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract . . . is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. . . . Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient . . . or (2) by any other means authorized by law: *Provided, however,* That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement *and has determined that compliance cannot be secured by voluntary means.* In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No

45 C.F.R. § 80.7(d).[36] *See Brown* v. *Weinberger*, 417 F. Supp. 1215, 1221 (D.D.C. 1976). On September 7, 1977, the Central Board and OCR entered into a Memorandum of Understanding. In that Memorandum, the Central Board agreed to assign or reassign teachers to comply with federal standards by 1980. This agreement was subsequently vacated by Judge Weinstein by order dated March 15, 1978, in a related proceeding sub judice before this court. *Caulfield* v. *Board of Education*, No. 78-6035 (2d Cir. filed Feb. 28, 1978).

Neither the Central Board nor District 11 contested the accuracy or the sufficiency of the Government's data and statistics but rather presented explanations to justify the disparities. Appellants contended, ultimately to no avail, that they had not intentionally discriminated. Rather, they argued that disparate assignments resulted from the state education law, from the requirements of collective bargaining agreements, and from demographic changes and other alleged "neutral factors," including the wishes of black principals and the desires of individual parent-teacher associations and of the black and white communities.

On September 27, 1977, the Central Board and District 11 filed a complaint in the district court. The district court reviewed the administrative record and, after a hearing,

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such action shall become effective until thirty days have elapsed after the filing of such report.

(Emphasis added.)

36 If an investigation pursuant to paragraph (c) of this section indicates a failure to comply with this part, the responsible Department official or his designee will so inform the recipient and the matter will be resolved by informal means whenever possible. If it has been determined that the matter cannot be resolved by informal means, action will be taken as provided for in § 80.8.

45 C.F.R. § 80.7(d)(1) (1977).

not only denied the Central Board's motion for summary judgment, but granted the defendants' cross-motion for summary judgment affirming the denial of ESAA funds. As previously stated, however, the district court vacated its prior decision and remanded the matter to HEW for further consideration in light of constitutional criteria.

Thereafter, HEW determined that the City School District discriminated on a racial basis in the assignment of teachers and maintained an illegally segregated system in violation of the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964, and the requirements of ESAA. It also determined that after June 23, 1972, the Central Board took no effective steps to desegregate the system. While the Central Board was given an opportunity to rebut the statistical prima facie case of discrimination, its explanations were not persuasive. HEW, therefore, held that the assignment of minority teachers could have "come about only through foreseeable acts of discrimination."

Similarly HEW determined that District 11 was ineligible for ESAA funds for having discriminated in its teacher assignments on the basis of race, color or national origin. HEW also found District 11's explanations inadequate.

Upon review of the administrative record and the submissions by the Central Board and District 11 and after argument, the district court affirmed the findings and conclusions of HEW as supported by substantial evidence and entered its order granting judgment from which these appeals are taken.

IV. *Discussion*

A. *Constitutional Standard versus Impact Standard.*

The principal argument raised by appellants is that in evaluating the distribution of teachers throughout the New York City schools HEW should have employed the con-

stitutional test of intentional discrimination. *See* note 2 & accompanying text *supra*. To find a violation of the Fourteenth Amendment, the constitutional standard requires a showing not only of disparate impact, but also of illicit motive. *See* Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication*, 52 N.Y.U.L. Rev. 36, 39 (1977).[37]

While appellants argue that HEW's decision to deny ESAA funds relies solely on statistical evidence of disparate impact, contrary to Supreme Court cases construing the Fourteenth Amendment, we need not reach the question whether the evidence supports a finding of purposive segregative intent. Because we are dealing with an act of Congress, as amplified by HEW regulations, and not with a judicial determination whether certain acts have produced a Fourteenth Amendment violation, it is permissible for Congress to establish a higher standard, more protective of minority rights, than constitutional minimums require.[38] For example, Title VII cases have not required

37 Proof of "intentionally segregative actions on the part of the [school] Board," *Dayton Bd. of Educ.* v. *Brinkman*, *supra*, 433 U.S. at 413, can be presumed when the actions taken by the Board as a whole have the natural, probable and foreseeable result of increasing or perpetuating segregation. *See Arthur* v. *Nyquist*, *supra*, 573 F.2d at 142. *Nyquist* approved the intentional segregation standard of *Oliver* v. *Michigan State Bd. of Educ.*, 508 F.2d 178 (6th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975). *See* Note, *Reading the Mind of the School Board: Segregative Intent and the De Facto/De Jure Distinction*, 86 Yale L.J. 317, 332-43 (1976).

38 Alternatively this case may be analyzed as an exercise of congressional spending power. Congress has not prohibited discrimination in schools generally under its Fourteenth Amendment Section 5 powers, but has simply attached strings on grants of federal funds. *See Lau* v. *Nichols*, 414 U.S. 563, 569 (1974):

> "Simple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination."

(Quoting Senator Humphrey.) But "simple justice" aside, an exercise of the congressional spending power, here in aid of the Fourteenth

proof of discriminatory motive, at least where the employer is unable to demonstrate that requirements causing a disparate impact are sufficiently related to the job. *See International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 335-36 n.15 (1977); *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 432 (1971); *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802-06 (1973).[39]

Amendment, is afforded considerable latitude, *see Oklahoma* v. *United States Civil Serv. Comm'n*, 330 U.S. 127 (1947); *Steward Machine Co.* v. *Davis*, 301 U.S. 548 (1937), provided that Congress has not imposed unconstitutional conditions on the recipients of its appropriations.

The doctrine of "unconstitutional conditions" is not applicable in the present context. That doctrine provides that "government may not condition the receipt of its benefits upon the nonassertion of constitutional rights even if receipt of such benefits is in all other respects a 'mere privilege.'" L. Tribe, *American Constitutional Law* § 10-8, at 510 (1978); *see Sherbert* v. *Verner*, 374 U.S. 398 (1963) (state may not deny unemployment benefits to persons unwilling to work on Saturdays for religious reasons). No such condition appears here, unless it is the nonassertion of the "right" to have "disparate impact" alone not trigger fund-grant denial. But in the exercise of its spending power Congress may be more protective of given minorities than the Equal Protection Clause itself requires, although the point at which given non-minorities or their members are themselves unconstitutionally prejudiced remains in doubt even after *Bakke*. Still, in the alleviation of discrimination, the effect of congressional findings is not insubstantial. *E.g.*, *Regents of the University of California* v. *Bakke*, 46 U.S.L.W. 4896, 4905-06 (U.S. June 28, 1978) (Powell, *J.*); id. at 4918-19 (Brennan, *J.*); *United Jewish Organizations of Williamsburgh, Inc.* v. *Carey*, 430 U.S. 144 (1977).

39 *See Regents of the University of California* v. *Bakke*, *supra*, 46 U.S. L.W. at 4906 n.44 (Powell, *J.*). In considering the opinion of Justices Brennan, White, Marshall and Blackmun, *id.* at 4922, Mr. Justice Powell suggests that the other Justices are wrong "when they suggest that 'disparate impact' alone is sufficient to establish" a Title VII violation. *Id.* at 4906 n.44. But Justice Brennan's opinion appears to us to have a slightly different nuance from what Justice Powell attributes to it. Justice Brennan states that the Supreme Court's Title VII cases have sustained a statutory violation "even without a requirement of findings of intentional racial discrimination by those required or authorized to accord preferential treatment," *id.* at 4922, and "have held under Title VII that where employment requirements have a disproportionate impact upon racial minorities they constitute a statutory violation, even

Here, Congress intended to permit grant disqualification not only for purposeful discrimination but also for discrimination evidenced simply by an unjustified disparity in staff assignments. This conclusion seems clear from the statute which expressly requires that all ESAA "guidelines and criteria . . . be applied uniformly . . . without regard to the origin or cause of such segregation." 20 U.S.C. § 1602(a). Moreover, the ESAA proscription against employment discrimination forbids discriminatory acts and practices which violate statutory civil rights provisions such as Title VI of the Civil Rights Act of 1964.[40] It is significant that Title VI findings of discrimination may be predicated on disparate impact without proof of unlawful intent. *See Lau* v. *Nichols*, 414 U.S. 563, 568 (1974) ("[d]iscrimination is barred which has [disparate] *effect* even though no purposeful design is present. . . .") (emphasis in original); *Wade* v. *Mississippi Cooperative Extension Service*, 528 F.2d 508, 516-17 (5th Cir. 1976) ("statistical evidence alone may enable . . . plaintiffs to satisfy their initial burden of showing discrimination"); *cf. Griggs* v. *Duke Power Co., supra*, 401 U.S. at 432 (Title VII).

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in the absence of discriminatory intent, unless the employer is able to demonstrate that the requirements are sufficiently related to the needs of the job." *Id.* at 4918 (footnote omitted). The debate, then, would seem to turn on whether in all cases where the employment requirements are insufficiently related to the job there is necessarily discriminatory intent.

40 It is the policy of the United States that guidelines and criteria established pursuant to title VI of the Civil Rights Act of 1964 and section 182 of the Elementary and Secondary Education Amendments of 1966 shall be applied uniformly in all regions of the United States in dealing with conditions of segregation by race whether de jure or de facto in the schools of the local educational agencies of any State without regard to the origin or cause of such segregation.

20 U.S.C. § 1602(b).

To effectuate the disparate impact test mandated by the ESAA, HEW regulations condition eligibility for ESAA funds upon teacher assignment patterns which do not identify schools "as intended for students of a particular race or national origin." 45 C.F.R. § 185.43(b)(2); *see ante* at p. 4522. The regulation appears consistent with the statutory purposes of ESAA and must be approved by the court if it is "reasonably related to the purposes of the enabling legislation." *Mourning* v. *Family Publications Service, Inc.*, 411 U.S. 356, 369 (1973) (quoting *Thorpe* v. *Housing Authority*, 393 U.S. 268, 280-81 (1969)).

B. *Application of Disparate Impact Standard.*

HEW's decision that teacher assignment disparities warranted a denial of ESAA funds was not arbitrary or capricious. 5 U.S.C. § 706(2)(A). *See Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 415-17 (1971). Even if the appropriate standard of review were the "substantial evidence" test, the Secretary's denial must be affirmed since the data which we have reviewed above clearly support HEW's determination. It, therefore, follows a fortiori that the evidence precludes a finding of arbitrariness or caprice.

In disregarding "the origin or cause of segregation," 20 U.S.C. § 1602(a), HEW determined that the Central Board failed to present a sufficient justification for the racial disparities in teacher and staff assignments. The proffered justifications for the substantial disparities in the predominantly ten nonminority academic high schools included (1) restrictions on the transfer of teachers written into the collective bargaining agreement, (2) the desirability of teaching assignments in those schools, (3) the unwillingness of many nonminority teachers to teach in predominantly minority schools and (4) the unequal dis-

tribution of licenses in specific areas. None of these explanations is adequate to justify the racial disparities in staff assignments. The unequal distribution of licenses resulted from the very examinations which OCR previously determined had produced a racially significant disparate impact. *See* note 14 *supra*. Leaving aside whether the remaining justifications are sufficient as a matter of law, they have not been supported by adduced facts appearing on the record.

In sum, our holding rests on both a congressionally mandated disparate impact test and nonarbitrary administrative findings of discrimination. *See Regents of the University of California* v. *Bakke*, 46 U.S.L.W. 4896, 4906 (U.S. June 28, 1978) (Powell, *J.*); *id.* at 4922 & n.42. (Brennan, *J.*). Thus, the extent of the injury has been defined and the consequent remedy, here the denial of funds, specified. *See International Brotherhood of Teamsters* v. *United States*, *supra*, 431 U.S. at 347-48, 371-72; *United Jewish Organizations of Williamsburgh, Inc.* v. *Carey*, 430 U.S. 144, 155-57, 167-68 (1977); *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 762-70 (1976). The district court's remand to HEW was, therefore, erroneous, though immaterial here.

The judgment is affirmed, although on grounds different from those expressed by the district court.

APPENDIX II

Docket No. 78-6083

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the sixth day of October, one thousand nine hundred and seventy-eight

Present: Hon.James L. Oakes, C.J.,
Hon.William O.Mehrtens,D.J.,
Hon.M.Joseph Blumenfeld,D.J.,
Circuit Judges

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK, et al.,
Plaintiffs-Appellants,
v.
JOSEPH CALIFANO,JR.,SECRETARY,UNITED STATES DEPARTMENT OF HEALTH,EDUCATION AND WELFARE, et al.,
Defendants-Appellees.

A petition for a rehearing having been filed herein by counsel for the plaintiffs-appellants,

Upon consideration thereof, it is

Ordered that said petition be and hereby is DENIED.

/s/
A. Daniel Fusaro
Clerk

Docket No. 78-6083

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held in the United States Courthouse, in the City of New York, on the sixth day of October, one thousand nine hundred and seventy eight.

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK, et al,
Plaintiffs-Appellants,
v.
JOSEPH CALIFANO, JR.,SECRETARY,UNITED STATES DEPARTMENT OF HEALTH,EDUCATION AND WELFARE, et al.,
Defendants-Appellees.

A petition for rehearing containing a suggestion that the action be reheard en banc having been filed herein by counsel for the plaintiffs-appellants, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion.

Upon consideration thereof, it is

Ordered that said petition be and hereby is DENIED.

/s/
IRVING R.KAUFMAN
Chief Judge

APPENDIX III

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK, et al.,

Plaintiffs,

-against-

JOSEPH CALIFANO, Secretary, United States Department of Health, Education and Welfare, et al.,

Defendants.

MEMORANDUM AND ORDER

77-C-1928

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WEINSTEIN, D.J.

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Plaintiffs, the Board of Education of the City of New York, its Chancellor and nineteen local City school Boards, allege that the denial by the United States Department of Health, Education and Welfare of their applications for $17.5 million under the Emergency School Aid Act (ESAA), 20 U.S.C. § 1601 et seq., violates that Act and is arbitrary, capricious and illegal in violation of The Administrative Procedure Act. 5 U.S.C. § 702 et seq. They seek injunctive relief.

H.E.W. defends on the ground that there was ample basis to find a violation of ESAA since teachers in New York City are assigned upon the basis of race, color and national origin. ESAA specifically requires a finding of ineligibility for funds for any school district which after June 23, 1972, utilized any prohibited practice, including "discrimination based upon race, color, or national origin in the hiring, promotion, or assignment of employees of the agency." 20 U.S.C. § 1605(d)(1)(B)(Supp. II 1972)(emphasis supplied).

A compromise at the administrative level resulted in ESAA funds being allocated to all the local districts but District 11. The local districts agreed to reassign their teachers to eliminate racial disparity in teacher census in the schools within each district. Defendants agreed that some 14 million

dollars would be paid to the various acquiescent local school boards. This agreement reduced the amount of funds in dispute from $17.5 million to $3.8 million, a sum currently being withheld from the Central Board and Local Board 11. The other local school boards are no longer in the suit.

This court's power of review is limited. 5 U.S.C. § 706. Had H.E.W. adhered to constitutionally mandated procedure and to statutory standards its decision, whether favorable or unfavorable to the City, would have had to be affirmed. The record before this court suggests that the agency failed to consider the evidence offered by plaintiffs because it mistakenly believed it to be irrelevant. The matter must, therefore, be remanded for further consideration by H.E.W.

I. PROCEDURE IN THIS COURT

On September 27, 1977, this court held a hearing on whether a temporary restraining order should be granted. There were serious disputed issues of fact and law. Without a stay, funds previously set aside for plaintiffs for the 1977-78 school year would have been allocated to other school districts, resulting in permanent loss to the City, to District 11 and to tens of thousands of

children attending New York City's public schools. Accordingly, a temporary restraining order issued requiring the defendants to preserve and set aside $3.8 million, the appropriation originally earmarked for the Central Board and Local Board 11. On consent, the restraining order has been extended until today.

The court ordered the defendants to show cause why an order should not issue (a) rescinding defendants' denial of plaintiffs' application for funding under the Emergency School Aid Act, 20 U.S.C. §§ 1601-1619, and declaring the denial to be violative of that act and of applicable regulations, 45 C.P.R. § 185.01 et seq.; and (b) arbitrary and capricious and violative of 5 U.S.C. § 702 et seq.; (c) restraining defendants, as authorized by 5 U.S.C. § 705, from disbursing funds in the amount of $3,858,023.00 million now earmarked for the ESAA application of plaintiffs' Board of Education of the City of New York and District 11 and ordering defendants to retain funds in escrow for the use and credit of the Board of Education and District 11, pending the determination of this action; (d) granting plaintiffs' judgment awarding such funds to plaintiffs pursuant to its application; and (e) awarding plaintiffs' costs.

An evidentiary hearing was held on October 31, 1977. Additional time to supplement the record was

granted and there were supplementary oral arguments. The hearing, documents submitted by the parties and judicial notice establish the following facts and law.

II. ADMINISTRATIVE PROCEEDINGS

A. Chronology

In January of this year, plaintiffs submitted applications for ESAA funding to the Secretary of H.E.W., through the Regional Office of the Office of Education, H.E.W. The applications sought money for basic, pilot and bilingual programs in the public schools of the City of New York for the 1977-78 school year in Districts 1, 7, 9, 11, 12, 13, 16, 17, 18, 20, 21, 22, 25, 26, 28, 30 and 32 and in the high schools and special educational programs administered by the Central Board. The funds were to provide services for an estimated 40,000 students. On April 14, 1977, the Board, as instructed by the H.E.W. staff, submitted a revised application to defendant Califano. H.E.W. officials then informed plaintiffs that the educational programs described in the April, 1977 ESAA applications met all H.E.W. programmatic and fiscal requirements and that the applications were approved as to content and amount, subject only to a determination that no other legal impediments to funding existed. At this time

ESAA funds of approximately $17.5 million were tentatively approved and set aside by the defendants for the programs of the plaintiffs.

Impediments, however, did arise. In early July, 1977, the plaintiffs received a letter dated July 1, 1977, from defendant Herman R. Goldberg, Associate Commissioner of H.E.W.'s Equal Educational Opportunity Programs. Dr. Goldberg makes preliminary determinations of eligibility for ESAA funding. The letter advised plaintiffs that ESAA funding would be denied to New York City for the 1977-78 school term.

H.E.W. based its decision upon conclusions stated in a November 9, 1976 report by the Office for Civil Rights (OCR). The OCR report was based on an investigation of civil rights compliance in New York City under Title VI of the Civil Rights Act of 1964. It specified areas of alleged noncompliance with the provisions of Title VI. On April 22, 1977, the Central Board, on behalf of itself and the Local Boards, issued a report denying the existence of any discriminatory practice. The report contained supporting data purporting to rebut the conclusions of OCR.

Defendant Goldberg's July 1, 1977 letter cited several grounds for the denial of the plaintiffs' ESAA applications. Subsequently, H.E.W. advised plaintiffs that ESAA funds would be denied to plaintiffs solely on the ground of discrimination in assignment of teachers in the public schools. This is confirmed in Mr. Goldberg's letter of September 19, 1977. The litigation in this court has focused only on this issue.

H.E.W.'s findings were based on OCR statistics that allegedly reflected a low system-wide minority hiring rate in New York City public schools. The statistics reflected a strong correlation between minority teachers and minority students in some schools.

Defendant Goldberg's July 1, 1977 letter of denial also advised plaintiffs that, pursuant to section 185.46 of title 45 of the Code of Federal Regulations, they had an opportunity to show cause before him why the determinations of ineligibility should be revoked.

Plaintiffs requested and were granted such an opportunity. On July 20, 1977, a show cause hearing was held for Local Board 11. The Central Board's hearing was held on July 22, 1977. On July 26, 1977, Local Board 11 submitted supplementary materials as did the Central Board on August 10, 1977.

In a letter dated September 15, 1977, defendant Goldberg informed Local Board 11's Superintendent Nicholas Cicchetti that the information presented by the Board at the July show cause hearings and supplementary materials did not constitute a sufficient basis for H.E.W. to revoke its determination of ineligibility. Chancellor Irving Anker was similarly informed by a letter dated September 16, 1977.

Plaintiffs submitted evidence to H.E.W. in support of requests for waivers of ineligibility pursuant to 20 U.S.C. § 1605(1)(5) and 45 C.F.R. § 185.43(d). However, Chancellor Anker, in his October 26, 1977 affidavit, (p. 15), stated that the Board had already been "advised informally by defendants Goldberg and Tatel that waivers of ineligibility will not be granted to plaintiffs unless the remedy for eligibility is effectuated immediately, that is, a quota of teacher assignments is adopted and implemented by plaintiffs." Plaintiffs also maintain that although they have the right to seek a "Waiver of Ineligibility," such a waiver does not constitute an appeal of the final determination of ineligibility. Rather,

it is a procedure for securing a waiver of that final determination by showing compliance with a remedy ordered by H.E.W. See October 28, 1977 affidavit of Rosemary Carroll, Assistant in the Office of the Corporation Counsel of the City of New York, p. 4. The plaintiffs have exhausted all available administrative remedies.

On September 7, 1977, a number of parties, including the Central Board, independently entered into a Memorandum of Understanding with H.E.W. affecting teacher assignment. The Memorandum reportedly calls for the implementation of a three year plan for a more equal City-wide ethnic teacher distribution in the public schools. H.E.W. has indicated that it regards the Memorandum as compliance with Title VI of the Civil Rights Act. Compliance is apparently required if the City is to receive substantial funds other than those allocated under ESAA. The validity of this understanding is not raised in the instant action and the court makes no finding with respect to it.

B. Failure to Consider Evidence of Plaintiffs

There are no transcripts of the show cause hearings held on January 20, 1977 and July 22, 1977 by H.E.W. The affidavits and the legal memorandum submitted by the parties present conflicting accounts of what transpired at these hearings. Defendants contend that at both hearings defendant Goldberg made an independent finding of fact, considering but rejecting plaintiffs' evidence rebutting the prima facie case of discrimination made out by the statistics. Plaintiffs allege that they offered such evidence but that defendant Goldberg expressly refused to consider it, relying on statistics alone.

Plaintiffs explain in their supporting legal memorandum that because there was no transcript of the show cause proceedings, they have submitted the affidavits of Chancellor Anker and Superintendent Cicchetti. These affidavits, they maintain, represent the gist of the oral presentation made in support of the plaintiffs' 1977-78 ESAA applications. Plaintiffs' Memorandum of October 28, 1977, at p. 3. Chancellor Anker's affidavit of October 28, 1977, reviews in considerable detail the status of teacher assignments in 39 high schools cited in a list attached to defendant Goldberg's July 1, 1977 letter as having student teacher ethnicity levels which "possibly"

indicate that these high schools are intended for students of a particular race, color or national origin. See affidavit at par. 21. "A school by school analysis of this list," Chancellor Anker states, "such as was attempted to be made to defendant Goldberg at the show cause proceeding proves that such inference was entirely unfounded." Id. The rest of the affidavit reviews the status of each school included on the Goldberg list.

Defendant Goldberg's affidavit of October 18, 1977 does not address the question of exactly what he did or did not consider in ruling on the eligibility of the Central Board. In paragraph 19, he states:

> On the basis of the information and recommendations submitted to me by the Director, Office for Civil Rights, I determined that the Central Board did not meet the eligibility requirements for assistance under the Emergency School Aid Act for the reasons set forth in my letter of July 1, 1977 to Chancellor Anker (Exhibit 4, attached hereto).

In paragraph 22, he states:

> I determined that the information presented at the show cause meeting and materials provided by the Central Board under a cover letter to me from Chancellor Anker dated August 10, 1977 (Exhibit 6, attached hereto), did not constitute a sufficient basis to revoke the finding of ineligibility.

The defendants assert in their supporting legal memorandum that at the July 22, 1977 show cause hearing "[T]he Central Board offered no explanation as to why the indentifiability in the high schools existed." Defendant's memorandum of October 28, 1977 at p. 13.

The parties present equally conflicting accounts of the Community School District 11 show cause hearing held on July 20, 1977. Superintendent Cicchetti asserts in paragraph 18 of his affidavit that:

> On behalf of District 11, I submitted data on the two factors which bear on the charge of discrimination i) student population ethnicity patterns and integration strategies and ii) the teacher seniority and transfer right. In particular, I submitted specific data on all factors cumulatively affecting current student and teacher distribution at the schools cited by H.E.W. as "possible" [sites] of discrimination.

In paragraph 21, Mr. Cicchetti states that the agency did not consider District 11's evidence:

> Defendant Goldberg adamantly refused to hear or consider any evidence offered by District 11 to demonstrate eligibility for funding. In fact, defendant Goldberg stated at the show cause proceeding that he would only consider evidence controverting the accuracy of statistics and teacher ethnicity collected by the Office for Civil Rights.

The defendants dispute this. Defendant Goldberg's affidavit of October 18, 1977 does not address the question of exactly what he did or did not consider in ruling on

the eligibility of Community School District 11. In paragraph 20, he states:

> On the basis of the information and recommendations submitted to me by the Director, Office for Civil Rights, I determined that Community School District #11 did not meet the eligibility requirements for assistance under the Emergency School Aid Act for the reasons set forth in my letter of July 1, 1977 to Community Superintendent Cicchetti (Exhibit 5, attached hereto).

In paragraph 22, he states:

> I determined that the information presented at the show cause meeting and materials provided by the Central Board under a cover letter to me from Chancellor Anker dated August 10, 1977 (Exhibit 6, attached hereto), did not constitute a sufficient basis to revoke the finding of ineligibility.

In their brief, defendants contend that

> The plaintiffs did not challenge the accuracy of the information set forth in the July 1, 1977 letters of ineligibility (Exhibits 4, 5) at their show cause meetings or through correspondence; they did not provide Dr. Goldberg with any factual information concerning faculty assignment to permit him to revoke his determination of ineligibility.

Defendants' Memorandum of October 28, 1977, at p. 40. See id. at 44-46.

Faced with these sharply conflicting representations, the Court must, at this stage of the litigation, place substantial reliance on the contemporaneous documents.

Chief among these are the July 1, 1977, September 15, 1977, and September 16, 1977 letters written by defendant Goldberg. As noted above, these letters bear out the plaintiffs' contention that defendant Goldberg relied only on raw statistics in making his determinations of ineligibility for the Central Board and District 11.

In effect, the government confirmed plaintiffs' charge with respect to the nature of the show cause hearing. It took the position in this court that a full hearing requirement does not apply to the ESAA,

> Now a Fourteenth Amendment investigation does not take place. We would not want to represent that it does.

Transcript, October 31, 1977, at p. 38. At the outset of the hearing the court questioned the government about the evidence considered by Dr. Goldberg in making his eligibility rulings for Local Board 11 and the Central Board. A recess was granted so that the government could contact Mr. Goldberg. Following the recess the government advised the court:

> [W]e were advised by the Office of Education that Dr. Goldberg considered the statements and evidence presented to him by the Board, that he determined it was irrelevant and therefore he didn't have to decide whether it was true or not.

Transcript, October 31, 1977, at p. 27.

> At the informal hearing, statements and reasons were presented. Dr. Goldberg considered those but determined they were irrelevant, even assuming they may be true.

Transcript, October 31, 1977, at p. 33.

Plaintiffs were, it thus appears, granted a hearing where the evidence they submitted was not considered. The position of defendants is that this evidence is irrelevant--that is to say, even if it were true it could not change the result. In short, the defendants relied solely on the statistical disparities referred to in the November 9, 1976 letter of OCR.

III. EVIDENCE BEFORE H.E.W.

Denial of the funds involved in this litigation is based on findings by H.E.W. that teachers in New York City are assigned by the Board of Education in a racially discriminatory manner. In support of this finding defendants argued in this court that the City's agreement of September, 1977, with H.E.W., designed to reduce racial disparities in teacher school assignments, is a concession that teacher assignments have been made illegally in the past. But this agreement was reported to be in the nature of a consent judgment without any confession by the City of illegality. It was said to have been entered into to avoid the possibility of withholding hundreds of millions of dollars

in federal funds. Compare Letter of Director of Office of Civil Rights of H.E.W. of November 9, 1976 with his letter of September 9, 1977 and enclosure. To use this agreement as the evidentiary basis for withholding separate educational funds would be quite unfair. This purported justification for finding plaintiffs guilty of racial discrimination in teacher assignment is without merit.

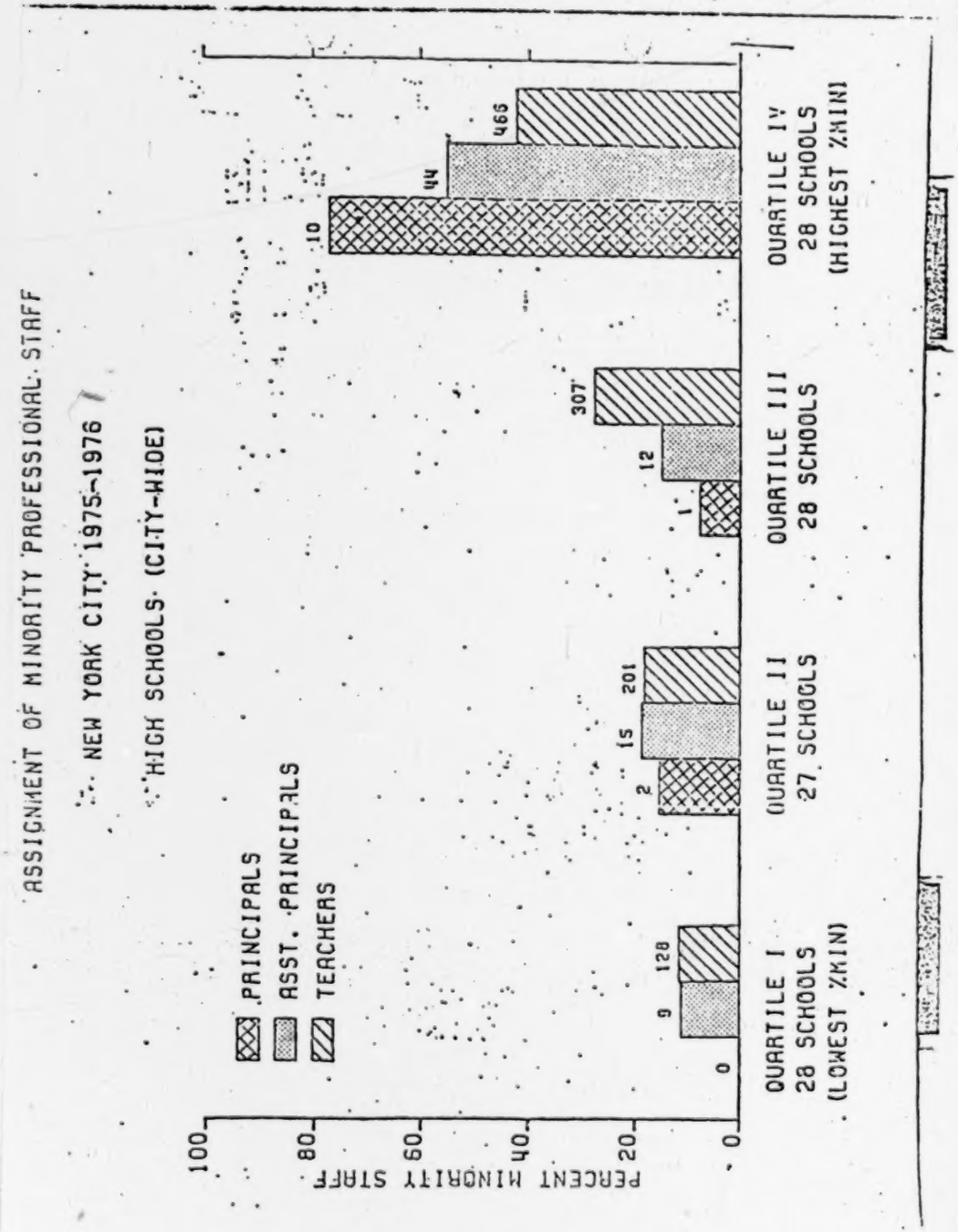
Equally without merit is the City's contention that the approval by H.E.W. of grants to the individual community school districts prevents its denial of a grant to the Central Board of Education. Within each of the school districts there has apparently been an agreement to equalize the assignment of teachers so that no school will have a disproportionate number of minority teachers. This may insure that within each district there is no pattern or practice of discrimination. But it does not insure that in the City as a whole there will be no such practice.

A. The Central Board

1. Citywide Statistics Showing Racial Disparity

The statistical data does lend support to H.E.W.'s finding that subsequent to 1972 there was a pattern of assigning teachers by the Central Board in a way that would tend to correlate the race of the teacher with the predominant race of the students in the school. There is a direct correlation between the numbers of minority teachers and the percentage of minority students in the City's schools when the schools are broken down into groups of low medium and high minority school population.

Set out below is a graph illustrating this correlation at the high school level for the school year 1975-1976. Information on the high schools is particularly damaging to the Central Board's case since it, and not the Local Boards, controls high schools.



An example of the statistical pattern at the elementary school level is set out below for the prior school year, 1974-1975.

DISTRIBUTION OF TEACHER POPULATION BY MINORITY AND NON-MINORITY GROUP
MEMBERSHIP AND DEGREE OF SCHOOL INTEGRATION
ALL ELEMENTARY SCHOOLS: 1974-1975

PERCENT MINORITY PUPILS PER SCHOOL	SCHOOLS		TOTAL TEACHERS		NON-MINORITY TEACHERS		MINORITY TEACHERS	
	NUMBER	PERCENT	NUMBER	PERCENT	NUMBER	PERCENT	NUMBER	PERCENT
0 - 9.9	49	7.9%	1,595	6.0	1,576	6.9%	19	0.6%
10 - 24.9	83	13.4	2,787	10.5	2,751	12.0	36	1.0
25 - 49.9	103	16.6	3,552	13.4	3,439	15.0	113	3.2
50 - 74.9	62	10.0	2,741	10.4	2,522	11.0	219	6.3
75 - 89.9	51	8.2	2,481	9.4	2,195	9.6	286	8.2
90 +	271	43.9	13,255	50.3	10,474	45.5	2,921	83.8
TOTAL	619	100.0	25,451	100.0	22,957	100.0	3,494	100.0

The disparity in ratios in the last and the current school years has apparently not changed appreciably despite perturbations of major teacher layoffs as a result of the City's fiscal crisis.

2. Plaintiffs Evidence Explaining Disparities On Grounds Negativing Discrimination

a. The High Schools

Substantial evidence was presented by the Central Board that there was neither intentional discrimination nor a pattern or practice after 1972 of assigning teachers by race. Particularly striking is the Central Board's school-by-school analysis of the history of some 40 high schools where the minority teacher and minority student populations correlate.

For example, the list includes Harlem, Park East, Harlem Prep, Lower East Side Prep, Satelite Academy, Pacific, Redirection and Auxiliary Services--all independent alternative high schools. They are mini-schools with student populations of 100; most high schools enroll between 1,200-3,000 students. Arguably, they should not properly be part of an analysis of staffing pattern in New York City high schools because the unique historical development of these schools, the exceptional methods of teacher selection, and their special educational programs and curriculum all preclude comparison with other

high schools. The students in these schools have all dropped out of other schools. Because of various impediments to learning such as drug addiction, pregnancy, criminal records, or more generalized social maladjustment these students require curriculum programs and counselling different in focus and concentration from that offered in other high schools. The schools themselves were originally private community schools. They have traditionally offered personalized guidance services, flexible curriculum and staggered teacher hours geared to the special needs of their students. For example, many of these schools operate into the evening hours. Teachers, thus, must be willing to work long and inconvenient hours. They must be motivated to develop contacts in the community, participate in family counselling and in general perform a myriad of duties which reflect a pervasive commitment to teaching children with special problems that affect their ability to learn. Recognizing the degree of teacher commitment necessary to meet the challenge at these special schools, the Board relies solely upon voluntary applications for staffing these alternative schools. There is, thus, arguably, no comparability between these schools or their teaching staffs and other high schools.

The high school staffing pattern reflects the academic subject matter or vocational courses offered at the specific high school. Generally the license areas with the fewest number of qualified and licensed teachers are mathematics, chemistry, physics, English and most recently Spanish and Hebrew. Eligible lists for these areas are completely exhausted and recertifications and even substitute licensed staff are recruited to fill such vacancies. For the bilingual areas, license examinations were developed only recently. On the other hand, some license areas traditionally have had greater numbers of licensed minority teachers than other. For example, the minority passing rate for an English high school license was relatively high, 49.23% (1974) and for a Social Studies high school license, low, 7.69% (1974). There is a greater incidence of minority group members possessing pedagogical licenses in home economics, cosmetology, and nursing, than, for example, in math, physics or chemistry. Staffs also reflect the teacher attrition rate and transfers. Schools with average teacher longevity of 10-15 years will more often be predominantly White than minority in teaching staff since the percentage of minority teachers with college degrees at that earlier period was even lower than the current 6% of all college graduates. The existence of these factors affecting distribution precludes,

the Central Board argues, a random distribution of 8.3% of minority teachers in every high school.

Bushwick and Eastern District High Schools both have high concentrations of Hispanic children who are non-English dominant. These schools provide the Aspira consent decree program, Title VII bilingual programs and English as a Second Language Program. Of the 130 teachers at Eastern District, 16 are Hispanic. Even using H.E.W.'s mathematical method of determining discrimination, subtracting these 16 teachers from the 18.0% minority teachers at that school puts its staffing level near the 8.3% high school-wide minority teacher population. Similarly, of Bushwick High School's 146 teachers, 6 are Hispanic. Subtracting these teachers from the minority teacher percentage puts that school's minority teacher percentage within 5% of the 8.3% figure. The Central Board is required to provide the Aspira program to all eligible children and has consequently had to hire bilingual staff on an expedited basis. The educational justification for a resulting concentration of Hispanic teachers in schools with high percentages of Hispanic children seems clear.

August Martin High School succeeded Woodrow Wilson High School in Southeastern Queens and was, when

opened in 1971, the only magnet thematic school in the City. The theory of a magnet school is that by developing a curriculum around an innovative educational theme students of all backgrounds will be attracted to attend the school. August Martin's location near John F. Kennedy International Airport made it an ideal site for a magnet school emphasizing aerospace studies. Teachers generally were selected from eligible lists to fill staff positions at August Martin but in instances where there were no licenses for specific areospace subjects, recruitment of persons with the most related backgrounds was undertaken. For example, there is no license in flying instruction, but a common branches teacher with a flight instruction service was hired and 150 students fly planes as part of the program. Similar selections were made for avionics, radio communication and other courses for which there are no specific licenses. The school, which is located in a largely Black middle class area, has a high attendance rate of 91% and 90% of its students go on to college. It has a work-study cycle at Kennedy Airport providing jobs in airplane maintenance, repair and airline clerical and reception work. It has six Title I teachers all of whom are monitored by Title I compliance teams. Many of the minority teachers have been part of the school staff since the time it was Wilson High

School. In assigning teachers to the innovative programs at this school the Board has not assigned teachers on the basis of race, but rather on the basis of possession of specific licenses in the subject areas to be taught, or by assignment of persons with relevant experience and most comparable licenses.

It is apparent from this detailed analysis that, had the Central School Board attempted to achieve a City-wide minority teacher average in each of its high schools, the result might have been improvements in statistics but deterioration in educational programs. Although each school's situation is explicable, H.E.W., given its expertise, might, however, have concluded that the overall City-wide pattern itself had not been sufficiently justified.

b. Justification of Disparities as Beyond Central Board's Control

The Board of Education contends that it is caught in a whirlpool of circumstances from which it cannot escape and that it has not intentionally discriminated. The factors it points to include State law; demographic changes in the student population of the City schools; collective bargaining agreements with neutral date of hire seniority practices; low minority incidence in the relevant available teacher work force; and incidence and distribution of vacancies in specific teacher license areas.

1. State Law on Teacher Appointment

All teacher appointments and assignments in New York City public schools until 1970 were made pursuant to the provisions of Education Law sections 2569 and 2573. Under that statutory scheme, the Board of Examiners conducted competitive examinations for pedagogical licenses and promulgated lists of candidates ranked in order of performance on the examinations; eligible lists were then certified to the plaintiffs for appointment and assignment of teachers in rank order.

The Education Law also permitted assignment of persons with substitute license where there were an insufficient number of regularly licensed teachers to fill vacancies. Eligible lists have never described or identified the national origin or race of candidates for pedagogical assignment.

While this statutory pattern continues to be applicable in the City's high schools, a new method for teacher appointment and assignment for the City's elementary, intermediate and junior high schools was created by the 1969 amendments to the Education Law. This change was designed, in part, to achieve affirmative action goals in minority teacher hiring. Effective September, 1969, the New York City school system was restructured into 32 decentralized

Community School Districts. Subject to some powers retained by the Central Board and the Chancellor, the Districts were authorized to appoint and assign teachers. Educ. L. § 2590-e(2).

As part of the decentralization law, three alternative methods of teacher appointment and assignment were provided for schools within community school districts where the reading level is below the 45th percentile of reading scores for the local school district. Education Law § 2590-j(5). Appointments in such schools may be made from (1) eligible lists regardless of candidate ranking, (2) the National Teachers Examination, a qualifying (i.e., non-ranked) rather than a competitive examination, administered nationally by the Education Testing Service, or (3) lists resulting from qualifying examinations prepared and administered by the Board of Examiners. The last of these lists had the lowest ratios of minority teachers. Appointments to the top 55 percentile reading score districts were to be made from ranked lists containing relatively small numbers of minority teachers.

These amendments to the Education Law were enacted with the stated purposes of (1) equalizing reading achievement levels; (2) increasing the number of minority teachers employed in the New York public school system; (3) eliminating overutilization of substitute licensed teachers;

and (4) encouraging local community solutions to educational problems. The technique used was in the nature of a political compromise that satisfied minority groups, which obtained more minority jobs in minority districts, without offending Whites, who could continue to choose teachers from predominantly White teacher lists purportedly chosen on a merit selection basis.

Revisions of the New York Education Law were based on a number of racial factors which could no longer be ignored. City public school student population had dramatically changed from predominantly non-minority to predominantly minority. The percentage of minority teachers--7% in 1969--though consonant with the percentage of minority individuals in the relevant available work force--5% of college graduates in the United States and the New York Metropolitan area--was relatively static and disproportionate to the continually increasing minority student population. Low reading achievement, particularly among minority students, fostered a developing educational consensus that minority teacher role-model theories should be explored, at least experimentally, in schools where low reading levels warrant new educational approaches. Minority teacher hire rates had increased in school districts where the National Teachers Examination and qualifying, rather than competitive examinations for teacher selection, had been utilized

experimentally. An overdependence on substitute licenses was developing in various school districts, particularly those with high concentrations of minority students; this development was due in part to reluctance of some older teachers with tenure to teach in schools in areas with high minority populations where crime rates and violence was greater than in some other areas of the City. White teachers tended to live closer to schools with White student bodies while Black and Hispanic teachers tended to live closer to schools with high minority ratios; to the extent that convenience of teachers and their social and professional friendships entered into assignments, there was a tendency towards ethnic concentrations.

Teacher hiring during the period 1970-71 through 1974-75 indicated that the purpose of the amendments to the Education Law--increasing minority teachers--was substantially realized. For Blacks the percentage change was + 15.2%; for Hispanics it was + 112.6%. The overall percentage of minority teachers in the school system more than doubled from 7% in 1969 to 15% in 1976. In view of the tenure of older teachers, the contraction of the public school system under fiscal pressures, reductions in students due to a drop in birth rates, increases in private school enrollment, and loss of central city population, this change is reflective of a strong policy

to increase the percentage of minority school teachers.

One predictable result of these statutory changes was that a disproportionate percentage of the new minority teachers were assigned to schools with disproportionately high minority school populations. The districts in the lowest 45 percentiles of reading scores were the districts with the highest minority populations. Local pressures of the minority populations to ignore the ranked lists in these districts meant that Black teachers found it easier to obtain jobs in these districts than in the White-controlled, White student districts.

An irony of this litigation is that among the circumstances that now serve to block ESAA funding is the more than twofold increase in minority teachers in the school system between 1969 and 1976. During this lawsuit, the federal government has acknowledged that it has no desire to challenge the constitutionality of the 1969 amendments to New York's Education Law. It approves the resultant growth in the proportion of minority teachers but not their assignment to predominantly minority schools.

2. Demographic Changes

In 1957, the student population of the New York City School District was 68.3% non-minority; in 1975, 32.1% non-minority. During the same period the non-minority population of New York City decreased by 702,699, while the minority population increased by 815,566. Non-minorities continued to leave the City in larger, and enter the City in smaller, percentages than minorities. The birth rate of the minority population has been substantially higher than that of others. Moreover, the ratio of minority students to others in non-public schools remains relatively low and private school enrollment has continued to increase.

Housing patterns in virtually all boroughs of the City of New York reflected such large concentrations of minority and non-minority groups that zoning of school feeder patterns to achieve racial balance became increasingly difficult during the 1960's and 1970's. To improve racial balance, the Board devised various zoning strategies, such as choice of admissions, paired schools, and scrutiny of school site selection. It is apparent, nevertheless, that the schools have become more, rather than less, desegregated and that this trend continues virtually unabated.

3. Contractual Provisions and Court Orders

Teacher assignments reflect date-of-hire seniority under provisions of the collective bargaining agreement

between the Board of Education and the United Federation of Teachers which provide that vacancies as they arise must be offered in the first instance to teachers with the greatest length of service. Under these contractual provisions, on May 15 of each school year, teachers have been able to request transfers to system-wide vacancies based upon system-wide seniority. As a matter of self-selection, teachers choose schools near their homes or schools they find more congenial. Ethnic concentrations result.

Vacancies in specific licenses must, where possible, be filled by licensed persons. Thus, the number of minority and non-minority persons possessing specific licenses and the number of vacancies in a particular license area determine the incidence and distribution of teachers in the school system--these are ethnic concentrations based upon historical ethnic favoring of some fields more than others.

Implementation of the consent decree in Aspira of New York, Inc. v. Board of Education, 72 Civ. 2004 S.D.N.Y. August 29, 1974), requiring the provision of bilingual instruction to Spanish-dominant children resulted in the concentration of Hispanic teachers in schools with high Hispanic student populations.

Some reversal of the tendency to minority concentration is now expected. Under a newly developed teacher recall plan for fall 1977, assignments of teachers will be made so as to further racial balance of teaching staffs in all schools, not inconsistent with the Aspira consent decree.

B: Community School District 11

Only two schools in District 11, P.S. 111 and P.S. 112, out of 31, have both a disproportion of minority students and minority teachers. The staffs of these schools were apparently assembled prior to 1960, before they were minority schools. Transfer of the experienced minority teachers from these schools to others to achieve a statistical racial balance would, according to Local Board 11, disrupt current teaching programs to the disadvantage of both students and teachers. In District 11, the practice since 1972 has been, plaintiffs assert, to attempt to reduce the correlation between minority students and minority teachers by making all new assignments of minority teachers to non-minority schools. It remains to be determined whether any fluctuation in the minority teacher population in these schools was de minimis or statistically significant. See Hazelwood School Dist. v. United States, 97 S.Ct. 2736, 2743-44 (1977).

The City presents the following statistics and explanation concerning the assignments of teachers to P.S. 112 and P.S. 111.

The assignments of teachers to P.S. 112 are as follows:

	Total per Dist. 11	Total per H.E.W.	Min. Total per Dist. 11	Min. Total per H.E.W.
1971-72	33	32	6	6
1972-73	34	33	7	7
1973-74	33	36	5	6
1974-75	33	33	7	8
1975-76	24	29	6	7

For the year 1972-73, a teacher went on leave and was replaced by the non-permanent assignment of a minority substitute teacher in 1973-74; another teacher went on leave and 1 Black teacher achieved a license in Special Education and left the school reducing the number of minority teachers to 5. In 1974-75 the teacher on leave returned and 1 part-time bilingual teacher for a bilingual program was hired. In 1975-76 the bilingual program was not renewed and the number of minority teachers was again 6 as it had been in 1971-72.

The assignments to P.S. 111 are as follows:

	Total per Dist. 11	Total per H.E.W.	Min. Total per Dist. 11	Min. Total per H.E.W.
1971-72	42	48	11	19
1972-73	42	55	10	13
1973-74	44	58	11	17
1974-75	34	59	12	18
1975-76	39	47	11	14

Similarly for P.S. 111, the number of minority teachers was 11 in 1972 and is presently 11 with fluctuations resulting from teacher leaves and substitute assignments. November 9, 1977 affidavit of Nicholas Cicchetti at pp. 1-2.

H.E.W. disagrees with Local Board 11's justification. It maintains that the facts in the administrative record do not support plaintiffs' representations, but rather establish that since June 23, 1972, minority faculty members have been added to P.S. 111 and P.S. 112. H.E.W.'s own

analysis leads to the following percentages:

	% Minority Faculty P.S. 111	% Minority Faculty P.S. 112
1971/2	39.6	18.8
1972/3	23.6	21.2
1973/4	29.3	16.7
1974/5	30.5	24.2
1975/6	29.8	24.1

Gov'ts brief of November 10, 1977, at pp. 4-6.

The parties also disagree as to the proper interpretation of teacher statistics for P.S. 83 and P.S. 108, predominantly non-minority schools determined to be racially identifiable as a result of faculty assignments. The defendants present the following statistics for P.S. 108:

P.S. 108

Year	Total Faculty	Non-Minority Faculty	%Non-Minority Faculty
1971/2	23	22	95.7
1972/3	19	19	100.0
1973/4	18	18	100.0
1974/5	19	19	100.0
1975/6	15	15	100.0

Id. at p. 7.

Plaintiffs explain that District 11 is predominantly minority in student population (60%) although the surrounding community of the Bronx is predominantly non-minority in

residential population. That disparity in distribution of population results primarily from the fact that 17,000 children attend parochial schools in the District 11 area which have an 80% non-minority student population. Notwithstanding this demographic factor, P.S. 108 is an integrated public school with more than 50% non-minority students. There was, in 1971-72, one minority staff member--not a teacher, but rather a Bilingual School Community Coordinator who left the school to assume a supervisory position in another community school district. P.S. 108 has experienced a declining student register so that the teaching staff has consequently been reduced and teachers excessed to other schools or other districts. (23 teachers in 1971-72; 13 in 1977.) In view of the reduction in teaching staff there has, according to plaintiffs, been no opportunity to increase the minority teacher rate at this school until this school year when one special services' teacher was hired. November 9, 1977 affidavit of Nicholas Cicchetti, at pp. 2-3.

H.E.W. states that in P.S. 83 there were increases in the number of non-minority full-time faculty members. It presents the following statistics:

P.S. 83

Year	Total Faculty	Non-Minority Faculty	%Non-Minority Faculty
1971/2	36	34	94.4
1972/3	37	36	97.3
1973/4	35	34	97.1
1974/5	36	35	97.2
1975/6	29	28	96.6

Gov'ts brief of November 10, 1977 at p. 6.

Plaintiffs explain that P.S. 83 is an integrated public school. There were two minority teachers assigned to the school in 1971-72. One teacher was a substitute, that is not a regularly appointed member, who took an appointment in another school district. At P.S. 83 there has been a significant decline in the student register which has reduced the number of teachers assigned to the school from 37 in 1971-72 to 16 in 1977. Thus, teachers have been excessed from this school and there has been in fact no decline or change in the number of minority teachers assigned to this school since 1971-72. November 9, 1977 affidavit of Nicholas Cicchetti at p. 3.

IV. LAW

Congress adopted the ESAA as Title VII of the the Education Amendments of 1972. One purpose of the Act, Congress declared, is the provision of financial assistance to local educational agencies "to meet the special needs incident to the elimination of minority group segregation and discrimination among students and faculty in elementary and secondary schools. . . ." In section 702 of the Act, 20 U.S.C. § 1601 (Supp. II 1972), Congress expressed the need for federal funds to assist in "eliminating or preventing minority group isolation and improving the quality of education for all children." The Act makes funds available for a variety of enumerated activities related to its stated objectives. It sets forth standards for determining eligibility for assistance, 20 U.S.C. § 1605(a)(1) (Supp. II 1972) and criteria for evaluating applications for such assistance. 20 U.S.C. § 1609(c)(Supp. II 1972).

Congressional hearings on the bill make clear that eligibility for ESAA funding--specifically waivers of ineligibility after a finding of constitutionally proscribed segregation--do not depend upon absolute racial balancing of faculty and staff in every school. The colloquy between Congressman Esch and Congressman Puchinski, the bill's

sponsor is illuminating on the issue.

> Mr. Esch: I would like to inquire of the gentleman from Illinois, who is chairman of the subcommittee which produced this bill.....about one critical aspect of eligibility for assistance under this amendment. Will the Secretary be authorized to apply the holding in the Singleton case which is that you have to have a perfect racial balance in the faculty in every school in your district - as a condition or requirement for assistance under this program.
>
> Mr. Puchinski: The answer is absolutely not. If it did, very few school districts could qualify. The Secretary will have to apply the eligibility requirements spelled out in this amendment and those do not include racial balancing of faculty and staff in every school.

117 Cong. Rec. 39332-33 (1971).

The statute and applicable regulations speak of discriminatory practices after June 23, 1972. See 20 U.S.C. § 1601-12, 45 C.F.R. § 185.00 et seq. and 5 U.S.C. § 702. Section 1605(d)(1)(B) of title 20 of the United States Code provides that:

> no educational agency shall be eligible for assistance. . .if it has, after June 23, 1972,. . .engaged in discrimination based upon race, color or national origin in the hiring, promotion, or assignment of employees in the agency. . .

(Emphasis added.) Promulgated under section 1605(d)(1)(B) of title 20 is 45 C.F.R. section 185.43(b)(2) upon which

defendants assert plaintiffs' ineligibility for funding rests. Arguably, statistical data alone might be relied upon in enforcing the regulation since it refers to identification of schools--presumably by percentages of students or staff of certain races, colors or national origins. That section reads:

> no educational agency shall be eligible for assistance under the Act if, after June 23, 1972, it has had or maintained in effect any practice, policy or procedure which results in discrimination on the basis of race, color or national origin in the. . .assignment of any of its employees. . .including the assignment of full-time classroom teachers to schools of such agency in such a manner as to identify any of such schools as intended for students of a particular race, color or national origin.

(Emphasis added.)

Plaintiffs maintain that defendants have construed section 185.43(b)(2) to require the denial of ESAA funding merely because of a disparate incidence or distribution of minority teachers. This result-oriented construction, plaintiffs contend, is erroneous. It is inconsistent with section 1605(d)(1)(B) and misconstrues the regulations because, in effect, it creates an irrebutable presumption that disparate ethnic statistics of teacher incidence and distribution constitute discrimination in teacher assignment violative of ESAA.

Plaintiffs insist that disparate impact evidenced by statistical data is not tantamount to discrimination. According to the plaintiffs, the Constitution, statute and regulation require that evidence that a disparity results from neutral factors, rather than from a discriminatory purpose or plan, must be considered by H.E.W. in determining whether the assignment and hiring pattern observed bars eligibility for ESAA funding.

A. Burden of Proof

Statistical disparities alone provide the basis for a rebuttable, not an irrebuttable, presumption of discrimination. Irrebuttable presumptions are disfavored. In adopting a rule of evidence shifting only the burden of coming forward, Congress suggested a general policy against powerful presumptions unless it specifically found the need for a more powerful presumption. Fed. R. Evid. Rule 301; Cong. Record, Sept. 14, 1974, H 11929-11930. The Supreme Court has shown some disquiet with use of irrebuttable presumptions to deny important rights. Cf. e.g., Cleveland Bd. of Ed. v. La Fleur, 414 U.S. 632, 94 S.Ct. 791 (1974); Note, The Irrebuttable Presumption Doctrine in the Supreme Court, 87 Harv. L. Rev. 1534 (1974).

In Washington v. Davis, 426 U.S. 229, 96 S.Ct. 2040 (1976), the Court rejected the proposition that racial disproportion necessarily reflects illegal discrimination. It noted:

> But our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact.

Id. at 239, 96 S.Ct. at 2047 (emphasis in original). The Court explicitly held that:

> Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution. Standing alone, it does not trigger the rule, McLaughlin v. Florida, 379 U.S. 184, 85 S.Ct. 283, 13 L.Ed.2d 222 (1964), that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations.

Id. at 242, 96 S.Ct. at 2049. Citing Alexander v. Louisiana, 405 U.S. 625, 92 S.Ct. 1221 (1972), a case concerning discrimination in a jury selection, the Court gave further instruction on how the burden of proof shifts in a racial discrimination case:

> With a prima facie case made out, "the burden of proof shifts to the State to rebut the presumption of unconstitutional action by showing that permissible racially neutral criteria and procedures have produced the monochromatic result." Alexander, supra, 405 U.S. at 632, 92 S.Ct. at 1226, 31 L.Ed.2d at 542.

Id. at 241, 96 S.Ct. 2048.

Some aspect of mala fides, no matter how remote or indirect, must be attributable to the defendants before they can be found to have illegally racially discriminated. Whether an unacceptable state of mind be reflected by acting with intent to discriminate, Keyes v. School Dis. No. 1, Denver, Colorado, 413 U.S. 189, 93 S.Ct. 2686 (1973), or failing to act with intent that the failure have a discriminatory effect, or by willful or even negligent disregard of the racial effect of an act or failure to act, Hart v. Community School Bd. Ed., N.Y. Sch. Dist. 21, 512 F.2d 37, 51 (2d Cir. 1975), some delict, some illegal purpose, some blameworthy failure on the part of a defendant as a reason for accountability is required.

B. Intent to Discriminate

In Keyes v. School Dis. No. 1, Denver, Colorado, 413 U.S. 189, 93 S.Ct. 2686 (1973), the Court addressed the question of how intent is to be established in school desegregation cases. The Court first observed:

> There are no hard-and-fast standards governing the allocation of the burden of proof in every situation. The issue, rather, "is merely a question of policy and fairness based on experience in the different situations." 9 J. Wigmore, Evidence § 2486, at 275 (3d ed. 1940). In the context of racial segregation in public education, the courts, including this Court, have recognized a variety of situations in which "fairness" and "policy" require state authorities to bear the burden of explaining actions or conditions which appear to be racially motivated.

Id. at 209, 93 S.Ct. at 2698. It then noted that in discharging their burden of proof that segregated schooling is not also the result of intentionally segregative acts, "it is not enough, of course, that the school authorities rely upon some allegedly logical, racially neutral explanation for their actions." Rather, "[T]heir burden is to adduce proof sufficient to support a finding that segregative intent was not among the factors that motivated their actions." Id. at 210, 93 S.Ct. at 2698.

More recent discussions of discriminatory intent are found in Village of Arlington Heights v. Metropolitan Housing Development Corporation, --U.S.--, 97 S.Ct. 555 (1977) and Dayton v. Brinkman, 45 U.S.L.W. 4910 (June 27, 1977). Arlington involved a petition to rezone from single to multiple family classification, designed to increase minority housing facilities. The petition was denied by the Village of Arlington, an almost entirely White community. The Court of Appeals held that the "ultimate effect" of the Village's denial was racially discriminatory. The Supreme Court reversed.

> Respondents simply failed to carry their burden of proving that discriminatory purpose was a motivating factor in the Village's decision. This conclusion ends the constitutional inquiry. The Court of Appeals' further finding that the Village's decision carried a discriminatory "ultimate effect" is without independent constitutional significance.

Village of Arlington Heights, supra at 566. In note 21

the Court explained that:

> Proof that the decision by the Village was motivated in part by a racially discriminatory purpose would not necessarily have required invalidation of the challenged decision. Such proof would, however, have shifted to the Village the burden of establishing that the same decision would have resulted even had the impermissible purpose not been considered. If this were established, the complaining party in a case of this kind no longer fairly could attribute the injury complained of to improper consideration of a discriminatory purpose. In such circumstances, there would be no justification for judicial interference with the challenged decision. But in this case respondents failed to make the required threshold showing.

Id. In reaching its holding, the court identified, "without purporting to be exhaustive, subjects of proper inquiry in determining whether racially discriminatory intent existed." Id. at 565. It declared:

> Determining whether invidious discriminatory purpose was a motivating factor, demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available. The impact of the official action--whether it "bears more heavily on one race than another," Washington v. Davis, 426 U.S., at 242, 96 S.Ct. at 2049--may provide an important starting point. Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face. . . .The evidentiary inquiry is then relatively easy. But such cases are rare. Absent a pattern as stark as that in Gomillion or Yick Wo, impact alone is not determinative, and the Court must look to other evidence.

> The historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes. . . .The specific sequence of events leading up the challenged decision also may shed some light on the decision-maker's purposes. . . .For example, if the property involved here always had been zoned R-5 but suddenly was changed to R-3 when the town learned of MHDC's plans to erect integrated housing, we would have a far different case. Departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role. Substantive departures too may be relevant, particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached.
>
> The legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports. In some extraordinary instances the members might be called to the stand at trial to testify concerning the purpose of the official action, although even then such testimony frequently will be barred by privilege. . . .

Id. at 564-565 (footnotes and citations omitted).

The Court reiterated its position in Dayton v. Brinkman, supra. In that case, the Court concluded that the remedy imposed by the Court of Appeals was out of proportion to the constitutional violations found by the District Court. It noted:

> The finding that the pupil population in the various Dayton schools is not homogeneous standing by itself, is not a violation of the Fourteenth Amendment in the absence of a showing that this condition resulted from intentionally segregative actions on the part of the Board. Washington v. Davis, 426 U.S. 229, 239 (1976).

Id. at 4912. The Court further observed:

> We realize, of course, that the task of fact-finding in a case such as this is a good deal more difficult than is typically the case in a more orthodox lawsuit. Findings as to the motivations of multimembered public bodies are of necessity difficult, cf. Village of Arlington Heights v. Metropolitan Housing Development Corp., 45 L.W. 4073 (Jan. 11, (1977), and the question of whether demographic changes resulting in racial concentration occurred from purely neutral public actions or were instead the intended result of actions which appeared neutral on their face but were in fact invidiously discriminatory is not an easy one to resolve.

(Emphasis added.) Id.

In defining the concept of discriminatory intent, the Second Circuit has made it clear that so long as there is "foreseeable effect," there need not be a finding of racial motivation. Hart v. Community School Bd. Ed., N.Y. Sch. Dist. 21, 512 F.2d 37, 51 (2d Cir. 1975). Affirming the district court, the Court of Appeals held that:

> We conclude that enough has been shown of intentional state action through the community school board and its predecessor local school board to support a finding of segregative intent from the foreseeable consequences of action taken, coupled with inaction in the face of tendered choices.

Id. The Court also endorsed the language of the Sixth Circuit in Oliver v. Michigan State Bd. of Ed.:

> A presumption of segregative purpose arises when plaintiffs establish that the natural, probable and foreseeable result of public officials' action or inaction was an increase or perpetuation of public school segregation. The presumption becomes proof unless defendants affirmatively establish that their action or inaction was a consistent and resolute application of racially neutral policies. 508 F.2d 178, at 182 (6th Cir. 1974); cf. Higgins v. Board of Education, 508 F.2d 779 (6th Cir. 1974).

C. ESAA Standards

The cases interpreting ESAA indicate that while a statistical case will suffice to support a finding of illegality, rebutting evidence may establish legality. "A prima facie case of unconstitutional discrimination exists where it is possible to identify a 'white school' or a 'black school' simply by reference to the racial composition of its teachers and staff." Kelsey v. Weinberger, 498 F.2d 701, 706 at n. 31 (D.C. Cir. 1974). When it "is established that black teachers are so disproportionately assigned to

black schools, the responsible school authorities may fairly be required to demonstrate that such assignments were not racially motivated." Board of Ed., Cincinnati v. Department of H.E.W., 396 F.Supp. 203, 232 (S.D. Ohio 1975), rev'd on other grounds, 532 F.2d 1070 (6th Cir. 1976). See Adams v. Weinberger, 391 F.Supp. 269, 271 (D.D.C. 1975).

Raw statistics are not necessarily dispositive if there is evidence showing lack of intent to discriminate. In Kelsey v. Weinberger, supra, where H.E.W. tried to grant ESAA funding, it argued that racial identifiability of faculties, standing alone, does not demonstrate racial discrimination within the meaning of the Act. As noted above, the District of Columbia Circuit modified this position, holding that statistical disparity makes out a prima facie case of discrimination. However, in Robinson v. Vollert, 411 F.Supp. 461, 477 (S.D. Tex. 1976) where H.E.W. attempted to deny funding, it took the position that "the mere existence of a significant statistical disproportion of itself rendered [the Galveston Independent School District] ineligible."

Robinson involved 20 U.S.C. § 1605(d)(1)(D), which provides that a school district is not eligible for ESAA funds if it has

> . . .had in effect any other practice, policy, or procedure, such as limiting curricular or extra-curricular activities (or participation therein by children) in order to avoid the participation of minority group children in such activities, which discriminates among children on the basis of race, color, or national origin. . . .

This provision is closely related to section 1605(d)(1)(B), the section at issue in the instant case. The Court's response to H.E.W. in Robinson is therefore of considerable significance in construing section 1605(d)(1)(B). The Robinson court flatly rejected H.E.W.'s position that non-statistical data is irrelevant:

> The Court is of the view that that interpretation reads section 706(d)(1)(D) too broadly. Section 706(d)'s language makes clear that it was aimed at specific forms of discrimination that may occur even in perfectly proportioned systems.

Id.

The relevant statute, regulations and cases indicate a failure of H.E.W. Before declaring a school board ineligible for ESAA funds, H.E.W. must find either that (1) the school board was maintaining an illegally segregated

school system on June 23, 1972 and it took no effective steps to desegregate after that date or (2) it had a practice after June 23, 1972 that was segregative in intent, design or foreseeable effect. It may rely on statistics alone to make this finding, but it may not ignore evidence tending to rebut the inferences drawn from the statistics.

A school board is entitled to an informal hearing to challenge a finding of ineligibility under ESAA. At a minimum an informal hearing requires the parties to be made aware (1) of the substantive standards that will apply, (2) that evidence submitted relevant to these standards will be considered, and (3) the reason for an adverse decision.

At the November 10, 1977 hearing the government informed the court that defendant Goldberg's rulings of ineligibility did not rest on a finding that (1) a constitutional violation existed in 1972 or (2) changes after 1972 increased the racial identifiability of schools. Defendant Goldbert merely relied upon the 1975-76 statistics. He did not find that after June 23, 1972 the plaintiffs "had or maintained in effect any practice, policy or procedure which results in the. . .assignment of any of its employees." The statute requires such a finding. Before

such a finding can be made, the Constitution mandates that the plaintiffs must have an opportunity to rebut a statistical prima facie case of discrimination.

D. Scope of Review by District Court

This court's power to review an administrative agency's action is circumscribed. To hold unlawful H.E.W.'s action, it must be found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" / (5 U.S.C. § 706(2)(A)); "unsupported by substantial evidence" (Id. § 706(2)(E)); or "unwarranted by the facts" (Id. § 706(2)(F)). Appropriate weight must be given to H.E.W.'s expertise in educational matters. See, e.g., Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 91 S.Ct. 814 (1971)(informal agency action generally); Camp v. Pitts, 411 U.S. 138, 93 S.Ct. 1241(1973)(same); Schicke v. Romney, 474 F.2d 309 (2d Cir. 1973)(same); Board of Education v. Department of Health, Education & Welfare, 396 F.Supp. 203, 211 (S.D. Ohio 1975), rev'd on other grounds, 532 F.2d 1070 (6th Cir. 1976). If "the decision is based on a consideration of the relevant factors" and there was no "clear error of judgment," this court cannot "substitute its judgment for that of the agency." Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 415-417, 91 S.Ct. 814, 823-24 (1971). Plaintiffs

have demonstrated defendants' failures sufficiently to require corrective action by the courts.

V. CONCLUSION

The imagination and tenacity with which H.E.W. is enforcing its legal obligation to insure that federal funds are not used to foster racial discrimination in education is admirable. Nevertheless, the enormous power that control of the purse gives the Washington bureaucracy must be exercised with meticulous regard for local rights and the law lest it be used abusively to punish local school boards (and the children they educate) for racial situations the localities do not condone and are seeking to eliminate.

Nothing in the Constitution or ESAA's statute, legislative history, or administrative regulations justifies granting funds on the ground that a discriminatory practice has been beyond the local school authority's ability to control. This purported defense of the Central Board, though poignant in its demonstration of lack of personal blameworthiness, may be unconvincing to H.E.W. The fact that the discriminatory patterns which resulted in correlation of teacher and student assignment by race may have been exacerbated by state statutes and policies

is only relevant if those factors can be shown to be racially neutral. The Central Board is chargeable with discrimination caused by state statutes. H.E.W. could find that the statistical disparities are so grossly disproportionate to what would be expected in a racially neutral system that they represented a practice of discrimination based upon color or national origin in the assignment of teachers.

H.E.W. was not justified in ignoring the contention of the plaintiffs' that its teaching staff was not segregated in 1972 and that it did not discriminate after 1972 in assignment of teachers. Nor was it justified in denying plaintiffs a meaningful opportunity to rebut the statistical case of discrimination. As to these issues plaintiffs have presented evidence warranting a fair, even if informal, hearing and a fair determination.

In view of H.E.W.'s ability to arrive at sound judgments based upon conflicting data and the broad discretion vested in the agency, this is a case in which a decision either way by H.E.W. as to the claims of the Central Board and Local Board 11 would have been possible had proper standards been applied and a proper hearing been held.

Plaintiffs have demonstrated that H.E.W. may not have complied with mandated procedure or applied proper standards. The court, therefore, remands the case to H.E.W. for further consideration.

No costs or disbursements shall be allowed. A stay of this order and a continuance of the prior restraining order for thirty days is granted to permit application to the Court of Appeals.

So ordered.

Dated: Brooklyn, New York
November 18, 1977

U.S.D.J.

APPENDIX IV

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1144-49—September Term, 1977.

(Argued June 19, 1978 Decided September 5, 1978.)

Docket Nos. 78-6035, -6044, -6058, -6066, -6080, -6081

WILLIAM CAULFIELD, *et al.*,

Appellants,

—v.—

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, *et al.*,

Appellees.

Before:

OAKES and VAN GRAAFEILAND,

Circuit Judges,

and PIERCE,

*District Judge.**

Appeals from orders of the United States District Court for the Eastern District of New York, Jack B. Weinstein, *Judge,* (1) denying a motion for a preliminary injunction which sought to prevent collection of racial data and (2) remanding case to Department of Health, Education & Welfare (HEW).

Order denying preliminary injunction affirmed. Order remanding case to HEW reversed.

* Of the Southern District of New York, sitting by designation.

MORRIS WEISBERG, New York, N.Y. (Harold Hay, New York, N.Y., of counsel), *for Appellant-Cross-Appellee.*

LEONARD GREENWALD, New York, N.Y. (Gretchen White Oberman, Lewis, Greenwald & Oberman, New York, N.Y., of counsel), *for Intervenor-Appellant-Cross-Appellee.*

JESSICA D. SILVER, Washington, D.C. (Drew S. Days, III, Assistant Attorney General of the United States, Brian K. Landsberg, Cynthia L. Attwood, Department of Justice, David G. Trager, United States Attorney for the Eastern District of New York, Richard P. Caro, Assistant United States Attorney, of counsel), *for Appellee-Cross-Appellant.*

ARTHUR EISENBERG, New York, N.Y. (E. Richard Larson, Carol Ziegler, New York Civil Liberties Union, Robert Hermann, Lita Taracido, Puerto Rican Legal Defense and Education Fund, Inc., of counsel), *for Appellee-Cross-Appellant.*

DORON GOFSTEIN, Assistant Corporation Counsel (Allen G. Schwartz, Corporation Counsel of the City of New York, of counsel), *for Appellee New York City.*

OAKES, *Circuit Judge:*

On this consolidated appeal, the parties challenge two separate orders of the United States District Court for the Eastern District of New York, Jack B. Weinstein, Judge. The first is an order of February 24, 1978, denying the

motion of plaintiffs-appellants (appellants) who are New York City teachers, principals, community school board officials and parent-teacher association officials, for a preliminary injunction to prevent city, state and federal officials, defendants-appellees (appellees), from collecting data on the ethnic identification of teachers and supervisors. Appellants appeal the denial of the preliminary injunction against data collection. In the second order, dated March 15, 1978, Judge Weinstein sua sponte remanded the case to the Department of Health, Education & Welfare (HEW) for further administrative proceedings to afford appellants and other interested persons the opportunity to participate in the administrative proceeding. The federal appellees have cross-appealed from the order remanding the proceedings to HEW.

With respect to the order denying the injunction against data collection, we hold that the district court did not abuse its discretion in refusing to halt the collection of ethnic data on teachers and supervisors. We further hold that in its second order the district court erroneously remanded the case to HEW for further proceedings. Accordingly, we affirm the district court's order of February 24, 1978, but reverse its order of March 15, 1978.[1]

1 In view of the posture of the case below and the questions certified in the order for appeal under 28 U.S.C. § 1292(b), *see* note 8 *infra*, we do not reach three questions which were not decided on the merits below but are here raised by the appellants. Appellants argue that (1) HEW and the Office for Civil Rights (OCR) do not have power to take action upon allegations that the employment practices of the appellee Board of Education of the City of New York (City Board) discriminated illegally and unconstitutionally against minorities, (2) the City Board's employment practices complained about in a letter of OCR to the City Board dated November 9, 1976, *see* note 3 *infra*, do not constitute illegal and unconstitutional racial discrimination against minorities and (3) the Memorandum of Understanding between the City Board and OCR, *see* note 2 *infra*, and the City Board's actions carrying out its provisions unconstitutionally denied appellants equal protection of the laws by resulting in "reverse discrimination" and deprived them of liberty and property without due process of law.

I. *Background*

At this stage of the proceedings, no facts have been found, no stipulation of undisputed facts agreed upon, no evidentiary record developed. For purposes of the appeal, however, we will rely, as the district court did, on documents appended to various pleadings. These documents reveal that the principal subject of this lawsuit is a September 7, 1977, Memorandum of Understanding (Memorandum) between the Office for Civil Rights (OCR) at HEW on the one hand and the Board of Education of the City of New York (City Board) on the other. The Memorandum obligated the City Board to alter certain teacher and supervisor employment and assignment practices and to remedy the discriminatory effect of those practices on a phased basis by 1980. For its part, OCR agreed that the City Board's promised actions would constitute compliance with Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*, and Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-86.[2]

2 The Memorandum committed the City Board to undertake a number of actions, some of which include:

1. Not later than September of 1979, the teacher corps of each District in the system will reflect, within a range of five percent, the racial-ethnic composition of the system's teacher corps as a whole for each educational level and category, subject only to educationally-based program exceptions.

2. Not later than September of 1980, each individual school in the system will reflect, within a range of five percent, the racial-ethnic composition of the system's teacher corps as a whole for each educational level and category, subject only to educationally-based program exceptions.

3. The Board of Education will demonstrate to the Office for Civil Rights, subject to prescribed review, that any failure to meet the commitments set forth in paragraphs one and two hereof results from genuine requirements of a valid educational program. In addition, the Board will demonstrate that it has made and is continuing to make special efforts to overcome the effects of educationally-based

(footnote continued on next page)

The process leading up to negotiation of the Memorandum was set in motion on March 18, 1976, when the acting director of OCR wrote to the Chancellor of the City Board to notify him that OCR had received several complaints of discrimination by the City Board against minority teachers. The letter further informed the Chancellor that OCR would conduct a review of employment practices in the New York City school system to evaluate compliance with laws barring discrimination in federally financed programs. Following investigation, OCR informed Chancellor Anker by letter of November 9, 1976, that the City Board was in violation of Section 601 of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, and Section 901 of the Education Amendments of 1972, 20 U.S.C. § 1681.[3] That letter discussed the

program exceptions through effective use of such mechanisms as recertification, recruitment and special assignment of teachers.

* * * * *

6. The Board agrees, as soon as practicable to have performed a study of the relevant qualified labor pool by race, ethnicity, and sex by an independent expert acceptable to the parties and pursuant to methodology and standards agreed to by the parties. . . .

It is understood that this commitment shall not require the Board to lay off any teacher currently employed by the Board or to hire any teacher who has not met appropriate requirements for employment, not inconsistent with this agreement. It is further understood that the commitment made herein does not establish quotas. Failure to meet this commitment shall not be considered a violation of this agreement if the Board demonstrates that it has implemented the provisions of this agreement in a good faith effort to meet the commitment made herein.

The Board has advised the Office for Civil Rights that the Board expects to consult with the United Federation of Teachers and others regarding the selection of the independent expert and the standards and methodology to be used in the above study. . . .

* * * * *

3 The letter stated in pertinent part:

With respect to employment practices I have concluded that the New York City school system, in violation of section 601 of the

(footnote continued on next page)

City Board's employment practices, including its discriminatory methods of selection and assignment of teachers, called for submission of a remedial plan, and concluded by offering assistance in preparing the plan. Affidavits on file indicate that, at or about the same time, the OCR director attended a well publicized public briefing at which he explained OCR's findings and invited comments from those in attendance and from the community at large.

OCR's letter of November 9 prompted the establishment of an internal City Board committee to examine OCR's allegations. As part of its study, this committee consulted a number of organizations including some of those participating in this lawsuit as intervenors or amici curiae.[4] On

Civil Rights Act of 1964 (42 U.S.C. [§] 2000d), has, on the basis of race and national origin:

(1) denied minority teachers full access to employment opportunity through the use of racially discriminatory selection and testing procedures and through the use of racially identifiable employment pools in a manner that discriminatorily restricts the placement of minority teachers;

(2) assigned teachers, assistant principals and principals in a manner that has created, confirmed and reinforced the racial and/or ethnic identifiability of the system's schools; and

(3) assigned teachers with less experience, lower average salaries and fewer advanced degrees to schools which have higher percentages of minority students.

I have also concluded that the New York City school system, in violation of section 901 of the Education Amendments of 1972 (20 U.S.C. [§] 1681), has, on the basis of sex:

(1) denied females equal access to positions as principals and assistant principals throughout the system;

(2) provided a lower level of financial support for female athletic coaching programs; and

(3) deprived female teachers of seniority rights and other compensation through failure to eliminate the effects of past discriminatory leave policies.

4 These organizations included the American Jewish Congress, the United Federation of Teachers (UFT), the Council of Supervisors and Administrators (CSA), the NAACP and the New York Civil Liberties Union.

April 22, 1977, before the internal committee had completed its study, the City Board forwarded to OCR its response to the November 9 letter. Without admitting any violation of law, the City Board expressed its determination to rectify "disparate employment opportunities" and proposed an equal employment opportunity plan to "insure equality of opportunity and avoidance of discrimination." The City Board's plan suggested affirmative efforts to increase the number of minority teachers, to improve integration of the teaching staff, and to correct disparities of experience, salary and educational level in the distribution of personnel. The plan also advocated goals for integration of faculty based upon a numerical index, legislative replacement of rank order lists with qualifying lists for teacher selection, and a new system of teacher certification and selection. However, OCR found the plan insufficient and notified the City Board on July 6, 1977, that it was principally concerned with the lack of specificity in the City Board's response. Just prior to OCR's rejection of the City Board's plan, the report of the internal City Board committee (the "Gifford Report") was published. The Gifford Report furnished documentary confirmation of the discriminatory and segregative nature of the City Board's employment practices.[5] This report may well have exerted

5 In part, the Gifford Report summarized its conclusions as follows:

(1) *There is an inexplicable, non-rational disparity between the percentage of minority teachers in the New York City school system and the percentage of minority teachers in 46 other non-southern, urban school systems.*

In order to dismiss or affirm the possibility that the recruitment, selection, and placement practices of the New York public schools contributed to this disparity, we developed a sophisticated econometric model of the social and economic relationships affecting the size of the minority teacher population in New York City and 46 other non-southern, urban cities. The results of the analysis show,

(footnote continued on next page)

some considerable influence in the City Board's ultimate decision to conclude the Memorandum with OCR.

In negotiating the Memorandum, the City Board requested that the United Federation of Teachers (UFT), though not the other parties, be consulted on the terms of the agreement. The UFT was consulted and it agreed to support the adoption of legislation necessary to effectuate the Memorandum. In a press release the City Board hailed the agreement for having been reached "without resort to the courts or other confrontations that might have polarized our city." The release further described the Memorandum as an agreement which carries forward the existing affirmative action program and accepts a "commitment based on applicable standards of law." After the Memorandum was signed but prior to ratification, the City Board held a public meeting on October 19, 1977, with two weeks' advance notice. Thereafter, the City Board ratified the Memorandum by resolution.

in rather stark terms, that the percentage of minority teachers in the New York City public schools is less than one-half of what one would expect to find, if New York City were to "behave" like other cities.

This result, in and of itself, does not constitute proof of discrimination. It does indicate, however, that the percent of minority teachers in the public school system of New York City is far lower than it should be, given the available pool of minority college graduates in New York City and the characteristics of the New York City labor market.

(2) *Minority teachers are channeled into elementary and junior high schools in a manner that corresponds to the racial composition of the schools.*

This finding comes as no surprise since these results were anticipated by the state legislature when it mandated that teachers hired through the alternative method (NTE and "out of rank order" teachers) be restricted to elementary and junior high schools having high concentrations of educationally disadvantaged pupils.

(Emphasis in original.)

On October 31, 1977, the appellants[6] filed this action seeking a declaration that certain provisions of the Memorandum were unconstitutional, illegal and invalid. They also sought an injunction against the enforcement of those provisions and against requiring the appellants to provide data on the ethnic background of teachers and supervisors. Appellants sought summary judgment or a preliminary injunction. After a hearing, the district court by order of February 24, 1978, ruled only on that part of the motion for a preliminary injunction which sought to enjoin the collection of ethnic data and denied relief.[7] A notice of appeal was filed. This court denied an injunction pending appeal but expedited the appeal.

By the same order, the district court sua sponte directed that the pleadings of all plaintiffs be amended to include a claim that their constitutional and statutory rights were abridged by OCR's failure "to afford them and other interested persons the opportunity . . . to participate in the administrative proceedings." The district court then ordered all parties to appear on March 7, 1978, to show cause why the action should not be remanded for OCR's failure to afford such participation. At the March 7, 1978, hearing no party requested a remand but rather each sought to have the proceedings continue in the district court so that the district judge might decide the legality of the Memorandum. However, on March 15, the court ordered the agreement vacated and remanded the case to OCR. It also ordered the City Board relieved of its obligations

6 The district court granted numerous motions to intervene, including those of the UFT, the CSA, several community school boards, the Coalition of Concerned Black Educators, several black teachers represented by the NAACP, Ronald Ross (a black teacher represented by the New York Civil Liberties Union), the Public Education Association, and the American Civil Liberties Union.

7 The district judge stayed his order for 14 days to give appellants an opportunity to appeal.

under the Memorandum, denied all pending motions as moot with leave to renew, and stayed all proceedings pending completion of the administrative hearings on remand. This appeal followed.[8]

II. *Discussion*

A. Denial of the Preliminary Injunction Against Collection of Ethnic Data

Plaintiffs sought to enjoin the mandatory answering of ethnic questionnaires. These questionnaires were distributed to the school system's community school districts. All supervisors and teachers employed in the city's public schools were required to answer questions pertaining to their race, color, sex and national origin. In denying appellants' motion in the February 24 order, the district court made no findings of fact or conclusions of law, although it did note that there is a clear right and obligation of authorities to gather data in order to determine, *inter alia*, whether there has been unlawful discrimination.

This court has recently clarified the standard for issuance of a preliminary injunction: there must be a showing of possible irreparable injury *and* either (1) probable success on the merits *or* (2) sufficiently serious questions going to the merits to make them a fair ground for litigation *and* a balance of hardships tipping decidedly toward the party requesting the preliminary relief. *Selchow & Righter Co.* v. *McGraw-Hill Book Co.*, No. 77-7569, slip op. at 3533, 3537 (2d Cir. June 19, 1978); *Triebwasser & Katz* v. *American Telephone & Telegraph Co.*, 535 F.2d 1356, 1358 (2d Cir. 1976); *see* Mulligan, *Foreword—Preliminary Injunction in the Second Circuit*, 43 Brooklyn L. Rev. 831, 832-33

8 The March 15 order was certified in accordance with 28 U.S.C. § 1292(b). This court granted petitions for leave to appeal and cross-appeal and consolidated the appeal from the March 15 order with the appeal from the February 24 order.

(1977). Since appellants neither presented nor sought to present any evidence in support of their motion for a preliminary injunction, all that the district court had before it was a question of law. Absent any evidence, the district court could not conclude that the appellants were likely to suffer irreparable injury, much less that the balance of hardships weighed decidedly in their favor. *See Gillespie & Co. of New York* v. *Weyerhaeuser Co.*, 533 F.2d 51, 53 (2d Cir. 1976) (per curiam).

Moreover, appellants have failed to show that they are likely to succeed on the merits. *See id.* They argue, first, that because the agreement between OCR and the Board was vacated by the district court, any racial/ethnic survey to be conducted in conjunction with the Memorandum is invalid. However, they have made no showing that the survey of the ethnic composition of the existing staff of the school system would only be conducted because the Memorandum provided for it. Indeed, for all that appears in the record, this survey is one routinely conducted by the City Board as part of its annual school census.

Appellants also argue that because Title VI does not prohibit racial/ethnic discrimination in employment where providing employment is not a primary objective of federal aid, 42 U.S.C. § 2000d-3,[9] OCR cannot lawfully seek statistics regarding the ethnic and racial composition of the teaching staff. However, appellants have mischaracterized the nature of the OCR investigation. The charging letter of November 9, 1976, specifically noted that its concern with discriminatory employment practices was motivated by the unfortunate effect that these practices exercise on

9 Nothing contained in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment.

42 U.S.C. § 2000d-3.

minority schoolchildren: "[B]y assigning teachers to schools in such a manner . . . [,] minority children are generally taught by teachers with less experience, lower salary and fewer advanced degrees." Accordingly, OCR's investigation falls within the parameters of 42 U.S.C. § 2000d,[10] and not 42 U.S.C. § 2000d-3, *see* note 9 *supra*, since the objective of OCR's investigation was to alleviate discrimination against minority schoolchildren and not against minority teachers as such.[11] In the context of this OCR investigation, then, the collection of racial and ethnic data is authorized by Title VI.[12] *See United States* v. *Jefferson County Board of Education*, 372 F.2d 836, 882-84 (5th Cir. 1966), *aff'd*, 380 F.2d 385 (5th Cir.) (en banc), *cert. denied*, 389 U.S. 840 (1967).

Appellant's additional arguments that the proposed census would violate other federal statutes and the Constitution are unpersuasive. The Privacy Act of 1974, 5 U.S.C.

10 No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Id. § 2000d.

11 45 C.F.R. § 80.3(c)(3), which deals with the relationship between 42 U.S.C. § 2000d and 42 U.S.C. § 2000d-3, provides:

Where a primary objective of the Federal financial assistance is not to provide employment, but discrimination on the ground of race, color, or national origin in the employment practices of the recipient or other persons subject to the regulation tends, on the ground of race, color, or national origin, to exclude individuals from participation in, to deny them the benefits of, or to subject them to discrimination under any program to which this regulation applies, the foregoing provisions of this paragraph (c) shall apply to the employment practices of the recipient or other persons subject to the regulation, to the extent necessary to assure equality of opportunity to, and non-discriminatory treatment of, beneficiaries.

12 OCR has authority to collect racial data in school systems under the Emergency School Aid Act as well. *See* 20 U.S.C. § 1605(d)(1); 45 C.F.R. § 185.13(*l*); *Board of Education* v. *Califano*, Nos. 78-6083, 78-6088, 78-8120, slip op. at 4527-32 (2d Cir. Aug. 21, 1978).

§ 552a, is invoked but it does not prohibit the collection or retention of such data in this context. Title VI and its regulations authorize the collection of staff data which in turn is permitted to be maintained under 5 U.S.C. § 552a (e)(1).[13] Nor does the Equal Education Opportunities Act, 20 U.S.C. § 1751, prohibit the collection of racial and ethnic staff data.[14] At this stage of the record, where it does not appear whether or not teacher and supervisor assignments in the New York public schools violate Title VI, plaintiffs' assertion that these practices are not violative cannot be taken as fact. Thus any suggestion that OCR's actions are directed at overcoming simple racial imbalance is premature.

Finally, the Constitution itself does not condemn the collection of this data. *Cf. United States* v. *State of New Hampshire*, 539 F.2d 277, 280-82 (1st Cir.) (upholding as constitutional a requirement pursuant to § 709(c) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-8(c), that the State provide racial and ethnic employee data to the federal government on an EEO-4 form), *cert. denied*, 429 U.S. 1023 (1976). The one-sentence argument that the census produces a Fourth Amendment violation is frivolous; there is no search or seizure here involved. Nor is there a violation of the constitutional right of privacy of teachers and principals within *Griswold* v. *Connecticut*, 381 U.S. 479 (1965), or *Roe* v. *Wade*, 410 U.S. 113 (1973). *See* Note, *On Privacy: Constitutional Protection for Personal Liberty*, 48 N.Y.U. L. Rev. 670, 673-78, 697-701, 770-72 (1973); *cf. Whalen* v. *Roe*, 429 U.S. 589 (1977) (statute requiring submission of form with patient's name to State Department of Health in case of certain prescription drugs not unconstitutional); *Schachter* v. *Whalen*, No. 78-7154, slip op. at 4001 (2d Cir. July 19, 1978) (statute granting power to subpoena medical records from doctor under investigation by State not unconstitutional).

13 Each agency that maintains a system of records shall—

(1) maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by executive order of the President[.]

5 U.S.C. § 552a(e)(1).

14 No provision of this Act shall be construed to require the assignment or transportation of students or teachers in order to overcome racial imbalance.

20 U.S.C. § 1751; *cf. Darville* v. *Dade County School Board*, 497 F.2d 1002, 1004-05 (5th Cir. 1974) (20 U.S.C. § 1651, which is identical to 20 U.S.C. § 1751, does not foreclose school assignment plans voluntarily adopted by school board which exceed constitutional minimums and the means, such as transportation, to carry out the plan).

B. District Court Remand to HEW

The federal appellees, as cross-appellants, argue strenuously that the district court erred in sua sponte remanding the case to HEW.[15] We agree.

15 Cross-appellants contend that the district court erred in raising and deciding a claim for relief not made by any party on the ground that there was no case or controversy. Since none of the parties except CSA raised any procedural question and since CSA itself did not specifically seek the remand to HEW which the district court ordered, cross-appellants argue that the propriety of the remand has not been presented in an adversary context. *See O'Shea* v. *Littleton*, 414 U.S. 488, 493 (1974); *Jenkins* v. *McKeithen*, 395 U.S. 411, 423 (1969) (Marshall, J.); *Flast* v. *Cohen*, 392 U.S. 83, 96-97 (1968). We are persuaded, however, that the requisite case or controversy exists. Even though CSA did not in haec verba request the district court to remand the case to HEW, CSA did ask that the Memorandum be held illegal for not permitting its participation; and CSA was careful to pray for such relief as the court deemed proper. *See Robinson* v. *Lorillard Corp.*, 444 F.2d 791, 802-03 (4th Cir. 1971), *cert. dismissed*, 404 U.S. 1006, 1007 (1972); 10 C. Wright & A. Miller, *Federal Practice and Procedure* § 2664, at 108-09 (1973); Fed. R. Civ. P. 54(c). In addition, at this stage in the proceedings, CSA has explicitly argued that the remand to HEW was proper. Consequently, the district court had and this court has jurisdiction to decide the question of the remand to HEW.

Section 602 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d-1,[16] provides for three types of action to secure compliance with the substantive provisions of Section 601, 42 U.S.C. § 2000d:[17] (1) refusal to grant or termination of assistance, (2) other means authorized by law such as a reference to the Department of Justice, 45 C.F.R. § 80.8(a),[18] and (3) voluntary means. Where the agency seeks to compel compliance through termination of funds or other means, Section 602 requires that the agency proceed by formal means including an administrative hearing at which a record is made. Before doing so, however,

16 Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made and, shall be limited in its effect to the particular program, or part thereof, in which such non-compliance has been so found, or (2) by any other means authorized by law: *Provided, however,* That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. . . .

42 U.S.C. § 2000d-1.

17 *See* note 10 *supra.*

18 If there appears to be a failure or threatened failure to comply with this regulation, and if the noncompliance or threatened noncompliance cannot be corrected by informal means, compliance with this part may be effected by the suspension or termination of or refusal to grant or to continue Federal financial assistance or by any other means authorized by law. Such other means may include, but are not limited to, (1) a reference to the Department of Justice with a recommendation that appropriate proceedings be brought to enforce any rights of the United States under any law of the United States (including other titles of the Act), or any assurance or other contractual undertaking, and (2) any applicable proceeding under State or local law.

45 C.F.R. § 80.8(a).

HEW must attempt to secure compliance by voluntary means. 42 U.S.C. § 2000d-1; *see* note 16 *supra.*[19]

While HEW's regulations specify a variety of procedures to effectuate fund termination,[20] they do not provide for

19 Congress's intent that HEW use voluntary means to secure compliance with Title VI before resorting to fund termination is clear. Senator Humphrey stated that

> [t]he first step, in all cases, will be advice to the appropriate person or persons and a reasonable effort to secure voluntary compliance. Obviously no hearing is required in connection with such efforts at voluntary compliance.

110 Cong. Rec. 8979 (1964). And Senator Ribicoff added:

> The agency could not immediately cut off the funds. As I view this matter, I hope that in the case of every agency and every county involved the officials of the agency would sit down with the officials of the county and would try to settle the problems voluntarily, before any action would be taken, including action to cut off funds, which would be the last resort.

110 Cong. Rec. 13129 (1964).

20 (c) . . . No order suspending, terminating or refusing to grant or continue Federal financial assistance shall become effective until (1) the responsible Department official has advised the applicant or recipient of his failure to comply and has determined that compliance cannot be secured by voluntary means, (2) there has been an express finding on the record, after opportunity for hearing, of a failure by the applicant or recipient to comply with a requirement imposed by or pursuant to this part, (3) the expiration of 30 days after the Secretary has filed with the committee of the House and the committee of the Senate having legislative jurisdiction over the program involved, a full written report of the circumstances and the grounds for such action. . . .

(d) . . . No action to effect compliance by any other means authorized by law shall be taken until (1) the responsible Department official has determined that compliance cannot be secured by voluntary means, (2) the recipient or other person has been notified of its failure to comply and of the action to be taken to effect compliance, and (3) the expiration of at least 10 days from the mailing of such notice to the recipient or other person. During this period of at least 10 days additional efforts shall be made to persuade the recipient or other person to comply with the regulation and to take such corrective action as may be appropriate.

45 C.F.R. § 80.8(c)-(d).

(footnote continued on next page)

public participation or a hearing when HEW acts infor-

(a) *Opportunity for hearing.* Whenever an opportunity for a hearing is required by § 80.8(c), reasonable notice shall be given by registered or certified mail, return receipt requested, to the affected applicant or recipient. This notice shall advise the applicant or recipient of the action proposed to be taken, the specific provision under which the proposed action against it is to be taken, and the matters of fact or law asserted as the basis for this action, and either (1) fix a date not less than 20 days after the date of such notice within which the applicant or recipient may request of the responsible Department official that the matter be scheduled for hearing or (2) advise the applicant or recipient that the matter in question has been set down for hearing at a stated place and time. . . . An applicant or recipient may waive a hearing and submit written information and argument for the record. The failure of an applicant or recipient to request a hearing for which a date has been set shall be deemed to be a waiver . . . .

(b) *Time and place of hearing.* . . . Hearings shall be held before a hearing examiner . . . .

(c) *Right to counsel.* In all proceedings under this section, the applicant or recipient and the Department shall have the right to be represented by counsel.

(d) *Procedures, evidence, and record.* (1) The hearing, decision, and any administrative review thereof shall be conducted in conformity with sections 5-8 of the Administrative Procedure Act, and in accordance with such rules of procedure as are proper (and not inconsistent with this section) relating to the conduct of the hearing, giving of notices subsequent to those provided for in paragraph (a) of this section, taking of testimony, exhibits, arguments and briefs, requests for findings, and other related matters. Both the Department and the applicant or recipient shall be entitled to introduce all relevant evidence . . . .

(2) Technical rules of evidence shall not apply to hearings conducted pursuant to this part, but rules or principles designed to assure production of the most credible evidence available and to subject testimony to test by cross-examination shall be applied where reasonably necessary by the officer conducting the hearing. The hearing officer may exclude irrelevant, immaterial, or unduly repetitious evidence. All documents and other evidence offered or taken for the record shall be open to examination by the parties and opportunity shall be given to refute facts and arguments advanced on either side of the issues. A transcript shall be made of the oral evidence except to the extent the substance thereof is stipulated for

(footnote continued on next page)

mally.[21] In addition, pursuant to Executive Order 11764 of January 21, 1974, granting the Attorney General authority to prescribe standards and procedures for Title VI enforcement, the Attorney General has adopted regulations which provide simply that any agreement to "take remedial steps . . . shall be set forth in writing by the recipient and the federal agency[,] . . . specify the action necessary for the correction of Title VI deficiencies and . . . be available to the public." 28 C.F.R. § 42.411(b). No other procedures, such as a hearing or public participation, are required. These regulations are entitled to some weight in construing the meaning of Title VI. *See Lau* v. *Nichols,* 414 U.S. 563, 566-69 (1974); *Udall* v. *Tallman,* 380 U.S. 1, 16 (1965).

Because HEW did not seek compliance by fund termination, but rather by a voluntary agreement, HEW was not required to afford cross-appellees an opportunity to participate. The action taken here to effect compliance was precisely the type of action contemplated by Congress in using the phrase "voluntary means." 42 U.S.C. § 2000d-1; *see* note 16 *supra.*

Nevertheless, the district court held that participation was mandatory on the basis that the agreement was not voluntary. The principal reason for the district court's finding of involuntariness was that the City Board, along

the record. All decisions shall be based upon the hearing record and written findings shall be made.

* * * * *

45 C.F.R. § 80.9(a)-(d).

21 (d) *Resolution of matters.* (1) If an investigation pursuant to paragraph (c) of this section indicates a failure to comply with this part, the responsible Department official or his designee will so inform the recipient and the matter will be resolved by informal means whenever possible. If it has been determined that the matter cannot be resolved by informal means, action will be taken as provided for in § 80.8.

45 C.F.R. § 80.7(d)(1).

with the City as a whole, was in the midst of a fiscal crisis and presumably could not afford a fund termination while it litigated the issue of Title VI compliance. But the only fund termination sought by HEW related not to Title VI funds but to Emergency School Aid Act funds.[22] To be sure, a threat of potential fund termination lurked in the background since without such leverage voluntary compliance might possibly never be achieved. And after all, if there is lack of compliance, HEW is obligated to enforce the statute ultimately by terminating funds. *Adams* v. *Richardson*, 480 F.2d 1159, 1163 (D.C. Cir. 1973).[23] Undoubtedly then there is a certain amount of coercion inherent in the enforcement scheme. *See United States* v. *Jefferson County Board of Education, supra*, 372 F.2d at 856 (quoting Report of the United States Commission on Civil Rights, *Survey of School Desegregation in the Southern and Border States—1965-1966*, 2).

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22 *See Board of Education* v. *Califano, supra.*

23 *See* Stewart, *The Reformation of American Administrative Law*, 88 Harv. L. Rev. 1667, 1772-73 (1975):

> The resource and delay costs of formal proceedings are incurred by the agency as well as private parties and may seriously undermine the effective discharge of agency responsibilities. These burdens will mount as previously informal decisions on enforcement policies are subjected to formal processes of resolution. Increased procedural formalities may work to the disadvantage of public interest groups by exhausting their limited resources and providing organized interests a basis for delaying agency enforcement actions. Moreover, formal trial-type proceedings in many contexts may be inferior to informal negotiations as a means of agency dispute resolution and decision-making. The complex scientific, technological, social and economic issues presented in so much of current administration are often ill-suited for resolution by adjudicatory procedures that produce gargantuan records whose size "varies inversely with [their] usefulness." Judicialization of agency procedures and the expansion of participation rights may also aggravate the tendency for the agency to assume a passive role, focusing on the unique character of each controversy in order to reach an ad hoc accommodation of the particular constellation of interests presented.

(Footnotes omitted.)

Undercutting any actual coercion, however, are several points. The City Board's own study, the Gifford Report, confirmed the conditions cited in the November 9 letter from OCR. Moreover, the City Board's press release indicated that the agreement had been reached in a spirit of cooperation. And of course, the lack of participation by the Council of Supervisors and Administrators (CSA) cannot render a voluntary agreement involuntary. The City Board's commitments under the Memorandum, despite its impact on teachers and supervisors, came about by the City Board's decision to comply with OCR's interpretation of Title VI, not by any fund-termination action by OCR. *Cf. Maher* v. *Roe*, 432 U.S. 464, 475-76 & n.9 (1977) (distinction between direct "interference with a protected activity and . . . encouragement of an alternative [permissible] activity"). In addition, there was ample opportunity to communicate with the City Board between the time the terms of the agreement became publicly known and the time of its ratification, but no party, including CSA, sought to participate during that hiatus, although most parties were consulted in the interim.

In any event, the statutory scheme requires a hearing with notice only when HEW seeks fund termination. *See Board of Public Instruction of Palm Beach County* v. *Cohen*, 413 F.2d 1201, 1202-03 (5th Cir. 1969). Where, as here, Congress has determined what procedures shall be required in effecting compliance with Title VI, the courts may not override that determination simply because they believe other procedures would be preferable. *See Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 46 U.S.L.W. 4301, 4308 (U.S. Apr. 3, 1978).

Order denying preliminary injunction on collection of racial/ethnic data affirmed; order remanding to HEW for administrative proceedings reversed; cause remanded to the district court for hearing on the merits.

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APPENDIX V

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

----------x

BOARD OF EDUCATION :

-against- : 77 C 1928

CALIFANO :

----------x

United States Courthouse
Brooklyn, New York
September 27, 1978
9:30 o'clock a.m.

Before:

HONORABLE JACK B. WEINSTEIN, U.S.D.J.

NICHOLAS IANNELLI
ACTING OFFICIAL COURT REPORTER

EASTERN DISTRICT COURT REPORTERS
UNITED STATES DISTRICT COURT
225 CADMAN PLAZA EAST
BROOKLYN, NEW YORK 11201
[illegible]

Appearances:

JOSEPH BRUNO, ESQ.
GREGG MASHBERG, ESQ
Corporation Counsel
Attorneys for the Plaintiff

RICHARD CARO, ESQ.

Attorney for the Defendant
United States of America

THE CLERK: Civil motion, Board of Education versus Califano.

MR. BRUNO: Joseph Bruno.

MR. CARO: Richard Caro.

THE COURT: Yes.

MR. BRUNO: I asked for this conference, Judge. We do not have any papers in front of you on our most recent application, but as you know, the Board of Education v. Califano dealt with the 1977-78 application.

We have now the '78-79 application, where we approximate 6.1 million. We're in the same position we were when we came in on the last case.

We have a rejection letter from HEW which in essence sets forth the same grounds that we had in the prior application.

The main ground that still is left -- at least unresolved, anyway -- is the assignment issue, essestially issues that were involved in the Board of Education versus Califano. We appealed that case, and as the Court knows, we had a decision from the Second Circuit. We filed a petition for rehearing which grants to us a stay of the issuance of the mandate from the Second Circuit.

THE COURT: I was wondering why the mandate hadn't ckome down.

MR. BRUNO: Beyond that we are seeking a waiver of ineligibility from HEW which has not been denied but we've been advised by telephone yesterday from Washington that it will be denied.

Essentially HEW's position is that unless we're in absolute compliance they cannot waive an ineligibility. I'll present papers tomorrow but I thought it might be wise to do this today. Tomorrow is the last day -- to attempt to stay any dismissment of the funds which we think may come to the City. There is no fund set for the City right now but we have an application and we'll be asking that the Court essentially put this case in with the Board of Education re Califano, at least grant us a stay until we have a decision on the application from the Second Circuit, and I would add that we intend to file a petition for cert on the Second Circuit opinion when they deal with the constitutional test --

THE COURT: It's a very important case.

MR. BRUNO: All we are asking the Court to do at this point, at least preserve our potential

for receiving funding for 1978-79 year. This is a significant amount of money to us and with the situation we have with the Board of Education this would seriously curtail some of the programs that we run.

THE COURT: It's a very serious case and I understand your position, but in the original Board of Education v. Califano, 77-C-1928, an allocation had already been made. Here that hasn't been done.

MR. CARO: That is not true. There was no allocation.

THE COURT: Set aside. They decided you were entitled to it if you met the requirements, isn't that so?

MR. CARO: In the original one, yes, sir.

THE COURT: Now here you haven't even gotten to that point, isn't that right?

MR. BRUNO: I believe we're at the same position as in the prior one. Essentially the same thing. They are considering our application as they were in the 1977 application and they indicated we were ineligible for three reasons.

THE COURT: You would have gotten the 6.1 --

MR. BRUNO: We don't know what we would get.

THE COURT: In the other case they actually set aside funds for you.

MR. BRUNO: I think your letter of July 13th indicates that we did not have a specific fund.

MR. CARO: Yes, that is what I was advised at the time.

MR. BRUNO: We're in the same situation we were then. were then.

MR. CARO: The corporation counsel submitted to the Court of Appeals the '77-78 -- data underlying the '77-78 data with the denial of the '77-78 application, and the new statistics on that to the Court of Appeals. I advised the Court of Appeals, for example, with the statistics dealing with -- in response to their submission dealing with the high schools -- that notwithstanding the implementation that did take place, the memorandum of understanding with respect to the high schools, the racio-ethnic disparity in faculty had worsened in some of the cited high schools, for instance Forest Hills, unchanged; James Madison High School, the new schools within that category were added to the list.

The Second Circuit in commenting on the new data with respect to District 11 stated in footnote 31,

while HEW removed one school from this unsatisfactory list, the other three remained racially identifiable and three additional schools were deemed in violation of EISA criteria.

In another place they commented that there was a regression in the situation and it seems to me, notwithstanding the question of whether the Court has any jurisdiction to grant any relief, absence the filing of a complaint, perhaps the most appropriate thing at this point would be a denial of a TRO and denial of preliminary injunction, and allow them to ask the Second Circuit to grant them this stay.

MR. BRUNO: I will submit papers to the Court tomorrow morning.

THE COURT: I'll do that. I'll deny it. From a procedural point of view it's in an awkward position. It's true there hasn't been a remand yet. In that respect, since no order of this Court has issued I think collateral estoppel to the extent it's applicable doesn't apply yet. There is no final judgment.

On the other case, stare decisis does apply because the last statement of the higher court binds this court. The net effect is identical so

far as the parties to this litigation is concerned, and I have no alternative but to deny -- I would think -- a temporary restraining order and the preliminary injunction.

MR. BRUNO: All right.

THE COURT: I am bound by the Second Circuit decision.

MR. BRUNO: I would --

THE COURT: I think it's unfortunate.

May I see the decision?

MR. CARO: Yes.

(Whereupon the same was handed to the Court.)

THE COURT: I think it's unfortunate that what I consider now to be one of the most important decisions in school cases has been made by a Court of Appeals with only one Circuit Judge in effect deciding the major issue of constitutional and statutory law.

With all due respect to Judges Blumenfeld and Mahrtens, a matter of this great importance should not be in my opinion determined by one Circuit Judge. Not only is a grave constitutional issue involved, but a very serious problem of the relationship of a major administrative agency to

local school authorities is implicated.

The net result of a number of the Second Circuit decisions over the last few months has been, first, that the substantive rule permitting the administrative agency to withhold funds has been greatly broadened so that instead of the narrower or constitutional standard set forth by the Supreme Court, this extremely broad substantive standard applied by New permits withholding of funds.

I take no objection to that -- it may be sound law and I indeed find it a desirable substantive rule -- but it's a very major decision that implicates the dispersements of hundreds of millions of dollars and may affect the well-being financially of many school districts and many local municipalities.

That, taken with the further decision of the Second Circuit in Caulfield, C-A-U-L-F-I-E-L-D, decided --

MR. CARO: September 6th.

MR. BRUNO: I have it here.

(Whereupon same was handed to the Court.)

THE COURT: September 5, 1978. Two Circuit Judges and one District Judge. It has a combined implication of great importance. In Caulfield in

effect it was held that the threat of withholding of funds did not constitute sufficient coercion to make nonvoluntary for statutory purposes an agreement entered into between the City and the Federal Government.

The net result of these two cases is to make practically unreviewable any insistence by HEW directed to a unit such as the Board of Education of the City of New York to changes being made in its practices with respect to assignment of teachers.

Under these circumstances, practically, the City has no alternative but to "voluntarily" agree to any conclusions and demands of HEW. Again, this may be a perfectly sound position and this Court has no objection to it, but the combined implications with respect to a shift of power from the Courts to HEW and from local education authorities, the national educational authorities, is so grave as to warrant full consideration by the appellate courts of this nation.

This Court wishes again to emphasize that it is not in any way criticizing any of the opinions of the Court of Appeals, which it finds personally desirable.

Under the circumstances there is no alternative, I think, but to deny the temporary restraining order and preliminary injunction which will be sought by papers to be filed later today.

I think everybody agrees, don't you?

MR. CARO: Yes.

THE COURT: And don't you?

MR. BRUNO: The only thing I would ask is that I understand the mandate has been stayed. I don't know if -- what effect --

THE COURT: It doesn't -- it has no effect because it's stare decisis. The law of this Circuit is set. It's not a question fo collateral estoppel or res judicata in a technical sense. I am perfectly willing to abide by any decision the higher courts of this country make, but I have no alternative.

MR. BRUNO: I also asked HEW if they would voluntarily stay any disbursement of whatever might be anticipated to be coming to the New York City Board of Education under their 1978-79 grant.

You advised me that they would not do that at this state?

MR. CARO: That's correct.

THE COURT: No, I think since the matter is now

apparently before the Court of Appeals -- what is the situation in Caulfield? Is that before the Court of Appeals?

MR. BRUNO: Not yet.

MR. CARO: No one has filed a petition for reconsideration.

THE COURT: Or for cert?

MR. CARO: Or for cert today.

THE COURT: Have I gotten a remand yet on this case?

MR. CARO: I guess by October 5th, the day before our preconference --

THE COURT: Thank you.

Submit papers and try to consent to the form. I'll sign them this afternoon or tomorrow morning. I think really the Second Circuit should grant the stay here. I feel my hands are tied.

MR. BRUNO: Thank you.

MR. CARO: Thank you very much.

(Whereupon matter was adjourned for this date.)

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